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2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 05-44481

## 6 | In the Matter of:

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8 DELPHI CORPORATION ET AL,

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10 | Debtor.

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17

18 | March 21, 2007

19 | 10:29 AM

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21 | B E F O R E:

22 HON. ROBERT D. DRAIN  
23 U.S. BANKRUPTCY JUDGE

24

25

1 HEARING re Third Omnibus Objection to Claims with hearing to be  
2 held on 11/30/2006 at 10:00 AM at Courtroom 610 (RDD)  
3 Objections due by 11/24/2006, filed by John Wm. Butler Jr. on  
4 behalf of Delphi Corporation.

5

6 HEARING re Notice of Hearing Notice Of Claims Objection Hearing  
7 With Respect To Debtors' Objection To Proof Of Claim No. 7090  
8 filed by John Wm. Butler Jr. on behalf of Delphi Corporation.

9

10 HEARING re Notice of Adjournment of Hearing Notice of  
11 Adjournment of Claims Objection Hearing with Respect to  
12 Debtors' Objection to Proof of Claim No. 9956 (Joseph Reno)  
13 filed by John Wm. Butler Jr. on behalf of Delphi Corporation.

14

15 HEARING re Notice of Proposed Order (HEARING DATE: 3/21/2007 at  
16 10:00 AM) Notice of Presentment of Joint Stipulation and Agreed  
17 Order Disallowing and Expunging Claim Numbers 2299 and 2300  
18 Filed By Constellation NewEnergy - Gas Division, LLC and  
19 Constellation NewEnergy, Inc. filed by Neil Matthew Berger on  
20 behalf of Delphi Corporation.

21

22 HEARING re Notice of Presentment Notice Of Presentment Of Joint  
23 Stipulation And Agreed Order Compromising And Allowing Proof Of  
24 Claim Number 503 (Karl Kuefner KG) filed by John Wm. Butler Jr.  
25 on behalf of Delphi Corporation.

1 HEARING re Notice of Presentment Notice Of Presentment Of Joint  
2 Stipulation And Agreed Order Compromising And Allowing Proof Of  
3 Claim Number 447 (Moraine Maintenance Company, Inc.) filed by  
4 John Wm. Butler Jr. on behalf of Delphi Corporation.

5

6 HEARING re Notice of Presentment Notice Of Presentment Of Joint  
7 Stipulation And Agreed Order Compromising And Allowing Proof Of  
8 Claim Number 10275 (McDermott, Will & Emery) filed by John Wm.  
9 Butler Jr. on behalf of Delphi Corporation.

10

11 HEARING re Notice of Presentment Notice Of Presentment Of Joint  
12 Stipulation And Agreed Order Disallowing And Expunging Claim  
13 Number 5506 (G.P. Reeves, Inc.) filed by John Wm. Butler Jr. on  
14 behalf of Delphi Corporation.

15

16 HEARING re Notice of Presentment Notice Of Presentment Of Joint  
17 Stipulation And Agreed Order Disallowing And Expunging Claim  
18 Numbers 1214 And 3092 (Commissioner Of Revenue For The  
19 Commonwealth Of Massachusetts filed by John Wm. Butler Jr. on  
20 behalf of Delphi Corporation.

21

22

23

24

25 Transcribed by: Pnina Eiberg

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2 A P P E A R A N C E S :

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PROCEEDINGS

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THE COURT: Please be seated. Delphi Corporation.

3

I'm sorry we're late. Our -- our scheduled ECRO reporter was sick and we've been trying to make arrangements to have someone all -- the whole day. Why don't you go ahead?

6

MR. LYONS: Good morning, Your Honor. John Lyons on behalf of Delphi Corporation and its affiliates. I have here with me in court Mr. Dean Unruh, Delphi Claims Administrator, Karen Kraft who is managing restructuring counsel. Also, Mr. Tom Matz, Joe Warden and Lisa Diaz the Delphi claims team. And then handling the Reno matter that would be contested today is my partner Al Hogan, Chris Conners and also Mr. Skip Koontz at the Dinsmore and Shohl law firm.

14

THE COURT: Okay.

15

MR. LYONS: Your Honor, with your permission I could proceed to the agenda.

17

THE COURT: Why don't you do that?

18

MR. LYONS: But first, Your Honor, I wanted to hand up the chart that we do every other omnibus hearing to show the progress in the claims administration.

21

THE COURT: Okay.

22

MR. LYONS: And Your Honor, the chart shows that we've reached the midpoint in adjudicating or resolving over half the total claims filed in the case. There's about 16,000 claims and -- so we've -- I think this chart will show, Your

1 Honor, the progress we have been making. And also, it's  
2 noteworthy that a very significant portion of the remaining  
3 fifty percent are actually claims that will be dealt with under  
4 a plan of reorganization under the current framework agreement.  
5 So we've actually -- are far -- dealt with, you know, much more  
6 than fifty percent, in our view, of claims that will actually  
7 have to be handled through this process.

8 THE COURT: Okay.

9 MR. LYONS: Okay, Your Honor, turning to the agenda.  
10 Your Honor, I'd like to go rather quickly through some of the  
11 matters that are being continued. Item number 1, the claim  
12 objection relating to Autoliv, the parties have agreed to  
13 adjourn that to a future hearing date. No date is set.

14 Item number 2, the claim objection regarding the  
15 claim of Ms. Eva Orlik. That has been continued to April 13th.

16 And then finally, item number 3 on the agenda, the  
17 claim -- the objection to the claim of H.B. Performance  
18 Systems, Inc. Your Honor, that has been continued to May 10th.  
19 And actually, Your Honor, the parties have agreed to both  
20 adjudicate the claim filed against the Delphi estate along with  
21 the claim that Delphi has against H.B. Performance Systems. So  
22 Your Honor will actually have the opportunity to adjudicate a  
23 claim that Delphi has against this creditor by consent of the  
24 parties.

25 THE COURT: Okay.

1                   MR. LYONS: Okay. Now, with respect to agenda item  
2 number 4, there are a number of claims that were objected to in  
3 our third omnibus objection for which we have signed  
4 settlements. And we will hand the Court a disk of all these  
5 signed stipulations after the conclusion of this hearing.

6                   We have Moraine Maintenance, item number 4. That has  
7 settled for 22,000 dollars and change.

8                   Item number 5, Bank of Lincolnwood. That about  
9 has -- that claim has been settled for 667,000 dollars out of  
10 an initial assertion of a claim of over 1.2 million dollars.

11                  And again, all these settlements are done pursuant to  
12 our authority granted under the settlement procedures order.

13                  THE COURT: Okay.

14                  MR. LYONS: Again, item number 6, Your Honor, the  
15 claim objection to the claim of McDermott, Will and Emory.  
16 That claim has been settled for 16,422 dollars and eighty  
17 cents.

18                  Claim number 7 is -- or I'm sorry, item number 7 on  
19 the agenda is the claim objection relating to Gulf Coast Bank  
20 and Trust. That claim has been settled in the amount of  
21 200,000 dollars from an initial asserted claim of 347,043  
22 dollars and twenty-three cents. We're awaiting one more  
23 signature on that, Your Honor, so that may actually await  
24 tomorrow or the next day to submit to -- to Your Honor.

25                  Item number 8 is the claim objection regarding the

1 claim of Karl Kuefner. That claim has been settled for 611,381  
2 dollars and fifty cents. In addition, Mr. Kuefner is going to  
3 reserve his rights to assert a priority reclamation claim for  
4 16,927 dollars and sixty-six cents in the event that  
5 reclamation claims are afforded such a priority by Your Honor,  
6 which no determination has been made as of yet.

7 Item number 9 in the agenda is the claim objection to  
8 the claim of the Massachusetts Department of Revenue. The  
9 state of Massachusetts has agreed to withdraw that claim.  
10 They've -- they've concurred with our books and records that  
11 nothing is owed.

12 THE COURT: Okay.

13 MR. LYONS: Item number 10, Your Honor, these  
14 relate -- these claims relate to the fourth omnibus claims  
15 objection, the claim objection regarding the claim of DBM  
16 Technologies. The parties have reached an agreement and have  
17 resolved the setoff issue with DBM Technologies. We are still  
18 waiting for signatures which we should get later this  
19 afternoon. So hopefully we'll be able to submit that either  
20 this afternoon or tomorrow.

21 THE COURT: All right.

22 MR. LYONS: Item number 11 on the agenda, this  
23 relates to the six omnibus claims objection. The claim  
24 objection regarding the claim of Constellation NewEnergy. We  
25 have, with the concurrence of Constellation, agreed that two of

10  
1 the claims are duplicative and will be expunged and that -- and  
2 that the other two claims will survive. However, we will still  
3 reserve the rights to object on other grounds.

4 THE COURT: Okay.

5 MR. LYONS: And one more, Your Honor, item number 12,  
6 the claim objection regarding the claim of G.P. Reeves, Inc.,  
7 the claimant initially asserted claim for -- for 2,296 dollars  
8 but -- but the parties agreed to disallow and expunged the  
9 claim.

10 THE COURT: Okay.

11 MR. LYONS: Okay, Your Honor, we have a few more  
12 stipulations that are carried over from February 14th and March  
13 1st. In particular, Nissan Technical Center, Donna Wilson,  
14 Edith James, Freddie Johnson, Karen Sevens and Harold Woodson.  
15 We're in the process of just finalizing the settlement  
16 documentation and getting the signatures. So once we've  
17 finalized those we will submit them to Your Honor at the next  
18 hearing.

19 THE COURT: Okay.

20 MR. LYONS: All right. With that, Your Honor, I'd  
21 like to turn the podium over to my partner Al Hogan, who will  
22 be conducting the claim objection regarding the claim of Mr.  
23 Joseph Reno.

24 MR. HOGAN: Good morning, Judge, Al Hogan from  
25 Skadden, Arps, Slate, Meagher and Flom for the debtors. Judge,

1 we're here on -- with respect to the claims objection hearing  
2 for claim number 9956, claimant Joseph Reno. As the Court is  
3 aware, last week we discussed, in a chamber's conference, the  
4 concept that today's hearing would be limited to the liability  
5 aspects of Mr. Reno's claim and that's the way we'll be  
6 proceeding today.

7 From an evidentiary perspective, Judge, I know we  
8 submitted the -- the joint exhibit binder to chambers last  
9 evening. And again, as we discussed in the chamber's  
10 conference the parties agreed to relax, somewhat, the  
11 provisions under the claims procedures order in that there are  
12 additional deposition transcripts and other documents that were  
13 included in here that may have fallen outside the procedures  
14 orders. But by agreement of the parties, the declarations of  
15 the claimant, Mr. Reno, Ms. Patrick and Mr. Brown, who are the  
16 debtor's witnesses and the Exhibits 4 through 27 will be  
17 admitted for purposes of the hearing.

18 I just want to be clear that with respect to the --  
19 the last exhibit, that's tab 28 that is the debtor's  
20 demonstrative exhibit. That's not an agreed exhibit. I'm sure  
21 Mr. Chalker will, in fact, disagree with several of the entries  
22 there. So that's a demonstrative not -- not really offered for  
23 evidentiary purposes.

24 THE COURT: So -- let me make sure I understand. All  
25 exhibits except 28 are deemed admitted?

1 MR. HOGAN: That's correct. That was the agreement  
2 of the parties.

3 THE COURT: And 28 is the demonstrative so it will  
4 just be used for that purpose.

5 MR. HOGAN: That's correct. It's just for purposes  
6 of discussion with the Court.

7 THE COURT: Okay. Is that right, sir?

8 MR. CHALKER: Yes, sir. Brad Chalker for Joe Reno  
9 and that is correct.

10 THE COURT: Okay.

11 MR. HOGAN: Judge, with that preliminary out of the  
12 way with respect to the evidence we can -- we can proceed with  
13 respect to the hearing. In terms of order of presentations,  
14 the debtor's objection to the claim -- the underlying claim is  
15 based on Mr. Reno's litigation so therefore he's got the burden  
16 of proof.

17 With respect to opening statements from the debtors,  
18 I'll say briefly, I know your court. Your Honor's read -- read  
19 our submissions. The evidence that we'll explore today will  
20 demonstrate that Mr. Reno was terminated by Ms. Beth Patrick,  
21 ultimately, at Delphi for engaging in conduct that violated  
22 Delphi's policies and attempting to cover up that contact.

23 THE COURT: Okay.

24 MR. HOGAN: That's all I will say for now.

25 THE COURT: I do have one question for you.

1 MR. HOGAN: Certainly.

2 THE COURT: The original response to the brief argued  
3 collateral estoppel based on the OSHA review. The amended one  
4 didn't raise that point and I'm just -- are you still asserting  
5 collateral estoppel or not?

6 MR. HOGAN: Judge, we're not.

7 THE COURT: Okay.

8 MR. HOGAN: We're not.

9 THE COURT: All right. All right so --

10 MR. HOGAN: We think that's persuasive and we  
11 certainly want to talk about that but as a legal matter we're  
12 not going to argue that the Court need not consider the  
13 merits --

14 THE COURT: All right.

15 MR. HOGAN: -- on a collateral estoppel basis.

16 THE COURT: Okay. All right.

17 MR. HOGAN: Mr. Chalker may want to make some opening  
18 remarks. I will say that I've read carefully Mr. Reno's  
19 declaration. And based on that declaration the debtors aren't  
20 going to have any cross examination of Mr. Reno. And so Mr.  
21 Chalker may want to proceed with opening remarks. Or he may  
22 want to go straight to the witnesses offered by the debtors.

23 THE COURT: All right. Well I -- I generally don't  
24 encourage opening remarks. I've read your papers and they're  
25 clear.

1 MR. CHALKER: That's fine, Your Honor. Brad Chalker.  
2 I did have a question procedurally, how much time each side is  
3 going to get to hear today?

4 THE COURT: Assuming we have a replacement for this  
5 person who's kindly filled in, and she has to leave about  
6 12:30, and I'm sure we will, I'm free all day. I mean, I'm not  
7 encouraging you to use up the whole day but --

8 MR. CHALKER: I understand, Your Honor.

9 THE COURT: -- but if you have to, I'm free.

10 MR. CHALKER: I understand. Thank you.

11 THE COURT: Okay.

12 MR. HOGAN: So Judge, in terms of proceeding, if --  
13 in terms of the evidence that's submitted, again, we have read  
14 Mr. Reno's declaration. We have no questions for him at this  
15 time. I'm not sure if the Court does.

16 THE COURT: No, I've read his declaration also.

17 MR. HOGAN: Okay.

18 THE COURT: And I don't.

19 MR. HOGAN: Then, with the Court's permission we can  
20 proceed to present the witnesses from the debtors, if that's  
21 acceptable to the Court?

22 THE COURT: Okay. That's fine.

23 MR. HOGAN: Judge, our -- the first witness that  
24 we'll present from the debtors is Ms. Elizabeth Patrick. Her  
25 declaration is contained at Tab 2 in the joint exhibit binder.

1 She is here in the court today prepared to answer Mr. Chalker's  
2 questions or the Court's questions.

3 THE COURT: Okay. Do you want to cross examine her?

4 MR. CHALKER: No, Your Honor, I don't.

5 THE COURT: Okay. All right. Well, again, I've read  
6 your declaration, ma'am. And I -- I -- I don't need to ask you  
7 any further questions either.

8 MR. HOGAN: Judge, then the second witness that we've  
9 offered for purposes of this hearing is Michael Brown. Michael  
10 Brown's declaration -- amended declaration is contained at tab  
11 3 of the joint exhibit binder. He is, as well, here in court  
12 today prepared to answer Mr. Chalker's questions or the Court's  
13 questions.

14 THE COURT: Okay. Do you want to cross examine Mr.  
15 Brown?

16 MR. CHALKER: Your Honor, Brad Chalker. With respect  
17 to Mr. Brown, we presented his statement as Exhibit -- joint  
18 Exhibit 5 -- strike that -- joint Exhibit 6. And also excerpts  
19 from his prior deposition, sworn testimony as joint Exhibit 21.

20 THE COURT: Right.

21 MR. CHALKER: And during my presentation I will make  
22 comments on those.

23 THE COURT: Okay.

24 MR. CHALKER: But that's sufficient. We don't need  
25 to take his live cross-examination and testimony here today.

1 THE COURT: Okay. Let me -- I think I know, but just  
2 for clarity's sake, which side has marked the deposition  
3 transcripts with the blue highlighter and which side with the  
4 yellow?

5 MR. HOGAN: The claimant's designations are with the  
6 blue and the debtors' are with the yellow.

7 THE COURT: Okay. All right. Very well. Okay. So  
8 there -- and again, I've read the declaration as well as the --  
9 the excerpts and the witness statement. And I think, also,  
10 some e-mails that Mr. Brown sent. So I don't -- I don't think  
11 I need -- well, I know I don't need --

12 MR. HOGAN: Okay.

13 THE COURT: -- any questions from him either.

14 MR. HOGAN: Well Judge, in -- I will tell you, I  
15 would have not guessed that we would close the evidentiary  
16 record in seven minutes on this hearing. But without any  
17 further questions of Mr. Brown, I believe we have.

18 THE COURT: Okay. All right.

19 MR. HOGAN: Again --

20 THE COURT: That's fine.

21 MR. HOGAN: The claimant, I believe, has the  
22 underlying burden of proof, in terms of closing remarks. I'd  
23 cede the podium to Mr. Chalker.

24 THE COURT: Okay. That's fine.

25 MR. CHALKER: Brad Chalker on behalf of the claimant

1 Joseph Reno. May it please the Court, this is a wrongful  
2 discharge claim with multiple causes of action and they're both  
3 federal and Ohio State law. Those causes of action are set  
4 forth in joint Exhibit 4, which is the amended complaint which  
5 was filed in Federal District Court in Dayton, Ohio. That case  
6 was stayed on the eve of a two-week jury trial by the filing of  
7 this bankruptcy proceeding. And, therefore, we are now here in  
8 this courtroom to present those same causes of action.

9 As I'm sure the Court is aware there are -- well,  
10 step back. The prime reason we are here is because of the  
11 whistle blower cause of action which is contained in joint  
12 Exhibit 4. It's not the only reason but it is the major point  
13 of dispute. I think that is fair to say. And as a result I  
14 think I should address that with most of my remarks here this  
15 morning.

16 As the Court is aware, there are three generally  
17 accepted elements with respect to a whistle blower claim. A  
18 protected activity, an adverse employment action and a causal  
19 connection between the protected activity and the adverse  
20 employment action. In the instant case, back in February of  
21 2004, my client, Joe Reno, was in charge of an environmental  
22 and safety emergency which was ongoing at the Delphi plant  
23 located in Kettering, Ohio which is near Dayton.

24 What was happening at that time was, there was a leak  
25 discovered in a 75,000 gallon chromium waste water treatment

1 tank containing hazardous, cancer-causing chromium waste.  
2 While engaged in addressing that environmental emergency a  
3 dispute arose, between Joe Reno and his supervisor at Delphi,  
4 as to the extent and cost of repairs to the leaking hazardous  
5 waste tank as well as to a companion tank, which is identical  
6 in its structure and capacity.

7 On the morning of February 20, 2004, Joe Reno and his  
8 superior, Mark Gooding, argued about that -- the repairs to  
9 this -- the repairs that were needed for this environmental  
10 emergency. And that same day, that same afternoon, that same  
11 supervisor, Mark Gooding, called Joe Reno into his office and  
12 suspended him from his employment at Delphi. Thereafter, on  
13 March 2, 2004, Joe Reno wrote a whistle blower letter, a copy  
14 of which is attached as joint Exhibit 7 in this proceeding.  
15 And finally, on March 17, 2004, Delphi terminated Joe Reno's  
16 employment after more than twentyyears of service to the  
17 company.

18 Applying those basic facts to the prima facie case  
19 for a whistle blower case there is no dispute, at least in my  
20 mind, as to the protected activity nor as to the adverse  
21 employment actions which were taken. The real question becomes  
22 whether there was a causal connection between the protected  
23 activity and the adverse employment action.

24 THE COURT: Before you get to that, and I know that's  
25 critical, what is your response to Delphi's argument that under

1 the Ohio statute, which the Ohio courts appear to interpret  
2 narrowly as far as the procedural requirements are concerned,  
3 Mr. Reno didn't go through the procedural hoops with his  
4 reporting and letter?

5 MR. CHALKER: Well, I disagree as to their  
6 interpretation of Ohio law. And I have included, at page 6 and  
7 of my trial brief, a copy of the Sixth Circuit case, John  
8 Jermer v. Siemens. I did that, specifically, to address why  
9 --

10 THE COURT: But isn't that -- I mean, I -- I'm just  
11 trying to focus on the whistle blower point. Wasn't that Sixth  
12 Circuit case really a common law -- I mean, you've also raised  
13 a common law whistle blower type of claim.

14 MR. CHALKER: Exactly, Your Honor. There are two  
15 counts, both under the statute, the Ohio Revised Code Statute  
16 upon whistle blowing, and then the public policy.

17 THE COURT: Right. And I understand the public  
18 policy argument. And that's why I think causation is  
19 ultimately important. But as far as the statute is concerned  
20 Delphi says that Mr. Reno didn't go through the hoops that the  
21 statute requires.

22 MR. CHALKER: Well, I disagree, Your Honor. And the  
23 reasons are stated in -- in the amended complaint as well as in  
24 the -- in trial brief. I don't think a whistle blower is  
25 expected to cite chapter and verse to the exact regulations

1 which are being violated in the whistle blower's opinion at  
2 that time. I'm sure there's no case law that says you have to  
3 do that. You just have to have sufficient specificity to bring  
4 to the attention of the employer what the violation is. And --  
5 and Joe Reno's three-page whistle blower does that. It is  
6 attached as Exhibit 7 to Exhibit 7.

7 THE COURT: What about the issue that the in-house  
8 lawyer that he sent the letter to wasn't the person that he had  
9 been communicating with about the tank?

10 MR. CHALKER: Well, as long as he brings it to the  
11 attention of the corporation, his employer, and he certainly  
12 did that by bringing it to the attention of Mr. Walle, who was  
13 at the corporate headquarters and who was in charge of  
14 environmental law matters. He obviously put the corporation on  
15 notice.

16 THE COURT: No, again -- but I'm -- I'm just  
17 distinguishing the Ohio statute from -- from the common law  
18 rule. I mean, it seems to me that the Ohio statute has this  
19 requirement that you send the letter, or the "written report"  
20 is how they phrase it, to the -- to the person that -- that  
21 you'd previously been talking with about the problem.

22 MR. CHALKER: I don't believe that -- that is  
23 accurate, Your Honor. The statute itself is --

24 THE COURT: Well, it says the employee orally -- this  
25 is RC 4113.52.

20

1 MR. CHALKER: Right.

2 THE COURT: It says the employee should orally notify  
3 his or her supervisor or other responsible officer of the  
4 employer of the violation. And (b) subsequently file with that  
5 person a written report --

6 MR. CHALKER: Right.

7 THE COURT: -- that provides sufficient detail,  
8 etcetera.

9 MR. CHALKER: Or other responsible person. And  
10 that's what he did in this case.

11 THE COURT: Well -- I'm sorry. That's in "(a)",  
12 right? But they -- it sets forth this -- this requirement that  
13 you file the report with the person that -- that you -- it says  
14 with that person, which refers to the people in "(a)". And he  
15 -- I don't think he -- I think he testified that he hadn't  
16 spoken with --

17 MR. CHALKER: Mr. Gooding?

18 THE COURT: No, no, with the person he sent the  
19 letter to before.

20 MR. CHALKER: Well, that's -- that's true, Your  
21 Honor. He had not.

22 THE COURT: Okay.

23 MR. CHALKER: But under any analysis, I think that  
24 even if the opposing counsel's analysis of -- of 4113.52 and  
25 requirements thereof is correct. Quite frankly I don't think

1 that matters because he's met his public policy burden with  
2 respect to the next count in the amended complaint.

3 THE COURT: I guess the other -- the other issue I  
4 have is, I believe the debtor makes the point that they did  
5 promptly hire consultants, as well as do their own effort, to  
6 correct or deal with the -- with the tank problem.

7 MR. CHALKER: What -- what they did, Your Honor, is  
8 predetermine how they were going to test the tank. And that is  
9 evidenced by Exhibit number 11. And -- and the date on that is  
10 February 19th. And they predetermined that they were only  
11 going to test the inside of this leaking, hazardous waste tank  
12 three feet from the -- from the ground. And these tanks are  
13 approximately twenty feet tall.

14 THE COURT: But -- but didn't they hire these  
15 consultants?

16 MR. CHALKER: They did and the consultants came back  
17 and said in Exhibit -- and these consultants are actually  
18 testing -- American Testing Services, Limited. And they came  
19 back with their report, dated February 20th, which is  
20 identified as Exhibit 13, and said that this tank does present  
21 a significant hazard. That is, a failure and it is rejected  
22 and it does not comply with the code section cited in there.  
23 But the point being --

24 THE COURT: But after doing that, didn't they then  
25 address the -- I mean, it seemed to be that -- to me, that they

1 addressed the problem by getting verification that what Mr.  
2 Reno said had some basis to it. They had -- they had someone  
3 else check and then they went and hired someone to fix it,  
4 didn't they?

5 MR. CHALKER: Well, number one, they -- they decided  
6 ahead of time not to inspect the entire leaking tank without  
7 knowing where the leak was coming from. Number two, they then  
8 had evidence in their hand via the American Testing Services  
9 report, identified as Exhibit 13, that the tank was presenting  
10 significant safety hazard. And then number three, they wrote  
11 this letter back to Mr. Reno on March 4th from Mr. Walle saying  
12 that none of those things, in fact, saying that we're still  
13 looking into the matter as of March 4th and that's simply not  
14 true. That letter, instead of complying with Ohio whistle  
15 blower --

16 THE COURT: Well, I'm sorry. The -- what exhibit is  
17 that?

18 MR. CHALKER: It's number 15, Your Honor. It's  
19 Wally's response to Mr. Reno's whistle blower letter. And what  
20 the statute says is that you can do two things in response to a  
21 whistle blower letter. One is, you can -- first is, you can  
22 acknowledge that the problem exists and you're dealing with it.  
23 And second is, say no, we've investigated, there is no such  
24 problem. This letter, dated March 4th, does neither.

25 THE COURT: Well it -- it says -- the statute says

1 you're supposed to make a reasonable good-faith effort to  
2 correct the violation or correct it.

3 MR. CHALKER: Your Honor, they didn't even test for  
4 all the violations. They only tested three feet up.

5 THE COURT: Okay.

6 MR. CHALKER: Back to the prima facie case, you need  
7 the -- the adverse action, the protected activity and the  
8 causal connection. I'll skip over the first two because  
9 they're obvious and jump right into causal connection. It's  
10 Mr. Reno's position that causal connection is provided by the  
11 temporal proximity between the adverse action and the  
12 protective activity. Namely same-day proximity with respect to  
13 his suspension on February 20th of 2004 and then close  
14 proximity between his whistle blower letter of March 2nd and  
15 his termination later in March, on March 17th of 2004. So it's  
16 our position that Mr. Reno has presented a prima facie whistle  
17 blower case with these facts.

18 And the real question then becomes whether the Delphi  
19 Corporation has presented a subsequent -- has presented a non-  
20 discriminatory reason for Mr. Reno's termination, which has  
21 nothing to do with his protected activity. The burden, in  
22 other words, shifts to Delphi to prove that legitimate non-  
23 discriminatory reason. The reason they point to in this case  
24 as reflected in their statements -- in their written statements  
25 -- is the completion of a third party investigation into a

1 dumpster on the part of -- a dumpster rented by my client Joe  
2 Reno. Their theory is that somehow Joe Reno intended to have  
3 that dumpster paid for by Delphi. That, undisputedly, never  
4 happened. But they did retain a third party investigator, a  
5 man by the name of Michael Brown, who's in the courtroom here  
6 today. He is and was as far -- was and is, as far as I know, an  
7 employee of Securitas, Inc., which is a stand-alone third party  
8 company. It is my mission here today to demonstrate that this  
9 completion -- that the completion of the third party  
10 investigation by Investigator Brown is and was a pretext for  
11 the wrongful termination of Joe Reno's employment.

12 To this end, I would refer the Court to Exhibit 5.  
13 Well, first to Exhibit 4 -- well -- strike that. Exhibit 5,  
14 sorry. Exhibit 5 which is the position paper letter prepared  
15 by Delphi in response to the OSHA investigation that took place  
16 with respect to Mr. Reno's termination of employment.  
17 Specifically, I would point out to the Court page 7 of that  
18 Exhibit 5, four bullets down where Delphi proffers its  
19 nondiscriminatory reason for terminating Mr. Reno's employment  
20 on July -- on March 17, 2004. And I quote, "complainant's  
21 suspension was essentially converted into a termination when  
22 Brown completed his investigation." So they are tying --  
23 Delphi tied, during an official government investigation, they  
24 tied the trigger event with respect to Mr. Reno's termination  
25 of employment, to the completion of their third party

1                   Investigator Brown's investigation. That simply is not true.

2                   If you look at Exhibit 6, which is Investigator  
3                   Brown's statement, page 2, you will see that he contacted Beth  
4                   Sacks and Mary Ann Pulvinan, corporate headquarters on February  
5                   20th of 2004 and informed them that his investigation was not  
6                   complete. Later on in his statement he makes the point that he  
7                   had no meetings or contacts with corporate individuals to  
8                   discuss his investigation since February 20th up to and through  
9                   the termination of Mr. Reno's employment on March 17th of 2004.

10                  So that period of time, March 20th when Mr. Reno was  
11                  suspended, after having an argument in the morning with his  
12                  supervisor, and later that same day being --

13                  THE COURT: You mean February 20th.

14                  MR. CHALKER: February 20th of 2004, I'm sorry Your  
15                  Honor. When that same day there were multiple important  
16                  events. One was the morning argument about dealing with the  
17                  environmental emergency, the afternoon suspension by the same  
18                  supervisor. And then on that same day the investigator, with  
19                  respect to the dumpster investigation, was informing Delphi  
20                  headquarters, I have not completed my investigation with  
21                  respect to the dumpster.

22                  Days go by, a period of time between February 20th  
23                  and March 17th of 2004 --

24                  THE COURT: Can I -- can I stop you, though?

25                  MR. CHALKER: Yes, sir.

1 THE COURT: On -- if you look at Exhibit 12 --

2 MR. CHALKEER: Yes, sir.

3 THE COURT: -- which is Mr. Brown's e-mail --

4 MR. CHALKER: Right.

5 THE COURT: -- to various Delphi people which is, I  
6 guess it's a February 20th 11:42 e-mail. If you look at his --  
7 the last paragraph he says, "if everyone agrees we could do one  
8 of two things. Delphi could suspend Joe pending further  
9 investigation [which is what it ended up doing or do so after a  
10 second interview]. It should be clear to everyone that Joe has  
11 violated several rules." And then he goes on to say, "I had  
12 hoped to conclude this investigation by this time, however due  
13 to the additional information and need for further interviews  
14 it will not be done today." And then he talks about his  
15 vacation. And the last sentence says, "I would like to be" --  
16 he leaves out the word be. "I would like to [be] a part of the  
17 pending action but if necessary Mark Gooding and Debbie Field  
18 know what I know and could go forward without my presence."  
19 And so, I guess, I want you to comment on whether -- whether  
20 the investigation was really necessary as far as if Delphi  
21 considered he had broken the rules, to fire him -- to -- to --  
22 either to suspend or to terminate.

23 MR. CHALKER: Your Honor, as of February 20, 2004,  
24 Investigator Brown had an incomplete investigation. He had an  
25 incompetent investigation and he had, thereafter, an illegal

1 investigation. There was nothing -- nothing that he had come  
2 up with that justified the termination, suspension or any  
3 adverse employment action against Joe Reno at that point in  
4 time.

5 Now, the reason --

6 THE COURT: Well, I guess that's kind of mixing a  
7 couple concepts. I mean, if it was -- if he's incompetent, it  
8 doesn't matter whether he finishes or not. But if it's -- I'm  
9 still going on the issue of "incomplete."

10 MR. CHALKER: Well, he says right in here -- the  
11 further action, above where you mentioned.

12 THE COURT: Yeah.

13 MR. CHALKER: The further action required.

14 THE COURT: Right.

15 MR. CHALKER: Interviews with David Atchison, Lowe,  
16 Ruble, secondary with Joe Reno. He did not complete his own  
17 plan of action on March 17th he still had yet to do an  
18 interview with David Atchison. He still had to do a second  
19 review -- interview with Joe Reno. Those -- to this day, Your  
20 Honor, that investigation plan is not complete.

21 THE COURT: Okay. Is it -- is there anything in  
22 the -- in the record -- I didn't see it, but maybe -- maybe I'm  
23 missing it, where Mr. Brown says what it is he would want to  
24 talk with Mr. Reno about in the second investigation?

25 MR. CHALKER: Well, I would hope that he would

1 present him with a summary --

2 THE COURT: No, I -- I --

3 MR. CHALKER: -- of his investigation.

4 THE COURT: That wasn't my question. I mean, we can  
5 all speculate what he might want to ask him about. And there  
6 are all sorts of different things.

7 MR. CHALKER: Well, the Fair Credit Reporting Act  
8 would require the summary of his report be given to the  
9 employee who is the subject of the adverse action. So the law  
10 requires or required that he be -- you know, that he either --  
11 that Delphi either -- you know. And the obvious thing is have  
12 Brown present the report, but that's not necessarily the way it  
13 had to be but the obvious -- in order to comply with federal  
14 law, Fair Credit Reporting Act, he should have supplied Mr.  
15 Reno with a summary of his findings and allowed Mr. Reno to  
16 rebut them, if he could.

17 THE COURT: Okay. But as far as my question was  
18 concerned, are you aware of any statement that he said what it  
19 was that he wanted to talk with him about?

20 MR. CHALKER: I am not.

21 THE COURT: And as far as talking with Mr. Atchison?

22 MR. CHALKER: Mr. Atchison was a key individual. His  
23 affidavit is in the record.

24 THE COURT: Right. I mean, again, we can speculate  
25 because I obviously, at one point at least, Calton said --

1 Calton said that he didn't think that Mr. Atchison was present.  
2 So we had speculated that that's what Mr. Brown would want to  
3 talk to him about but, again, does the record say anything as  
4 to what Mr. Brown wanted to talk to him about?

5 MR. CHALKER: Well, Mr. Atchison was identified as a  
6 defense witness by Mr. Reno on -- at his first interview. So  
7 anybody -- any competent investigator of employee misconduct,  
8 and definitely during the course of an employee misconduct  
9 investigation, must go talk to those folks who are identified  
10 as exculpatory as defense witnesses. So for that --

11 THE COURT: Okay. But there's no -- there's nothing  
12 that says why he wanted it. I mean I understand there's -- the  
13 second issue when we can speculate what someone would ask. And  
14 I understand your point that someone might, more than would  
15 they should ask those types of questions. But I'm just trying  
16 to figure out if there's anything in the record as to what he  
17 would want to say in those -- in those two interviews -- in  
18 those two things.

19 MR. CHALKER: All I can say is that its difficult to  
20 ascertain from the interim reports of Investigator Brown where  
21 he was going, why he was going there and why he didn't complete  
22 his investigation.

23 THE COURT: If -- if you look at the first full  
24 paragraph on that last page of that e-mail, he says "Troy still  
25 states that he drove Joe out of gate four in an Onyx truck

1 daily and took Joe around to Joe's personal vehicle. Troy also  
2 states that he -- that he nor any other of the treatment plant  
3 workers see or talk to Joe in the afternoon. Troy states he  
4 does not know where Joe is or what he's doing. When asked  
5 about any gratuities given to Joe or anyone else at Delphi,  
6 Troy stated that he buys chicken every Wednesday for the  
7 treatment plant employees, which amounts to approximately forty  
8 to thirty dollars. Joe is present for those lunches. He states  
9 that no other money, gifts or services are or have been paid."

10 There's nothing in the record about him wanting to  
11 talk to Mr. Reno about those sorts of things either?

12 MR. CHALKER: No, sir.

13 THE COURT: Okay. All right. Okay.

14 MR. CHALKER: Back to the issue of temporal  
15 proximity, which I would submit to the Court is -- is a key in  
16 this case. When we have, by virtue of Exhibit 5, Delphi being  
17 on record as to what they submit was the triggering event for  
18 Joseph Reno's termination on March 17th. They claim, they  
19 state, they represent, they material represent that it was --  
20 that the conclusion -- completion, use their word -- completion  
21 of third party Brown's investigation. That's not true because  
22 Brown never completed his investigation as is evidenced by his  
23 statement, Exhibit 6. And further evidenced by his sworn  
24 testimony in his deposition, and that's Exhibit 21 pages 40 and  
25 41. And I'm going to read this because it is so important:

8 So, unquestionably the investigator Brown is  
9 contradicting the very reason given by Delphi as to what  
10 triggered Mr. Reno's termination of employment on March 17th.

11 THE COURT: Could we -- I'm -- I'm sorry, because  
12 you're relying heavily on this submission to OSHA, Exhibit 5.

13 MR. CHALKER: Right.

14 THE COURT: I want to -- I want you to point me to  
15 the specific language about completion of the investigation.

16 MR. CHALKER: Sure. And we're talking about Exhibit  
17 6, Your Honor, second page.

18 THE COURT: It's -- it's five isn't it?

19 MR. CHALKER: Oh, Exhibit 5 being the Delphi letter  
20 to OSHA?

21 THE COURT: Yeah, I'm sorry, I --

22 MR. CHALKER: It's on page 7 of Exhibit 5. If you  
23 look at the top where it says, there is no evidence of a causal  
24 connection heading, the first bullet, Your Honor.

25 THE COURT: Yeah.

1                   MR. CHALKER: And then go down to the other 1, 2, 3,  
2        4, 5 bullets below that. And it's the fourth bullet down where  
3        Delphi makes the key representation in this entire exhibit that  
4        it was -- it was Mr. -- that -- and they say, and I'll quote it  
5        again, "complainant's suspension was essentially converted into  
6        a termination when Brown completed his investigation," and  
7        that's not true.

8                   I do want to discuss the joint exhibits in brief  
9        detail. But I do want to address one point now, if I could.  
10       In its declarations and pleadings filed with this Court, and in  
11       the most recent filing its timeline it submitted today, Delphi  
12       keeps claiming that it was Elizabeth Patrick who made the  
13       decision to terminate Joe Reno's employment. That's not  
14       accurate. According to Glenn Howarth's sworn deposition  
15       testimony at Exhibit 24, Mr. Howarth made the ultimate decision  
16       to terminate Joe Reno's employment. He says that -- lines 22,  
17       23 and 24 --

18                   THE COURT: I'm sorry. What -- what exhibit?

19                   MR. CHALKER: This is Exhibit 24, which is the  
20        excerpts from the sworn deposition testimony of Glenn Howarth.

21                   THE COURT: I think 24 is Calton's deposition.  
22        Twenty -- twenty-five is Howarth. At least in my book twenty-  
23        five is Howarth.

24                   MR. CHALKER: All right. Your Honor, let me -- let  
25        me address that. There's confusion on the numbers. I have in

1 front of me a joint exhibit listing, which was provided to my  
2 by opposing counsel, where they have designated Glenn Howarth  
3 as twenty-four. I guess they changed the numbers.

4 THE COURT: Anyway, I have it. I mean, I just wanted  
5 the record to be clear.

6 MR. CHALKER: Okay.

7 THE COURT: But he says here, I think it was -- we  
8 had -- we had a meeting to discuss the situation and Beth  
9 Patrick and myself made the ultimate decision.

10 MR. CHALKER: Right. It -- the point being that Beth  
11 Patrick, alone, did not make this decision in a vacuum by  
12 herself. And it's more important to note that what Glenn  
13 Howarth, who participated in this ultimate decision, who made  
14 the ultimate decision if you will, he admits later on that he  
15 was well aware of the whistle blower problem complaint raised  
16 by Joe Reno at the time. So any -- any suggestion that Beth  
17 Patrick made this in a vacuum without knowledge -- made the  
18 ultimate decision to terminate Joe Reno's employment, with no  
19 knowledge of the whistle blower complaint is simply false. And  
20 furthermore, the -- the participation of Mary Ann Pulvinan, on  
21 March 17, 2004, is significant. Because if you look back at  
22 what the Investigator Brown said in his OSHA statement, Exhibit  
23 6, he says that on February 20th I contacted Beth Sacks and  
24 Mary Ann Pulvinan at corporate headquarters to inform them that  
25 my investigation was not complete.

1 So in the meeting in Troy, Michigan there was a  
2 triumvirate who had made the ultimate decision to terminate Joe  
3 Reno's employment. Included in that triumvirate was Mary Ann  
4 Pulvinan with express knowledge that the Investigator Brown's  
5 dumpster investigation was not complete. Glenn Howarth, with  
6 full knowledge of the ongoing dispute between Delphi and Joe  
7 Reno, with respect to the protected activity and the leave with  
8 pay --

11 MR. CHALKER: She's present. As Howarth says in his  
12 deposition testimony, "from what I recall, it was Beth Patrick  
13 and myself and, I believe, Mary Ann Pulvinan" -

14 THE COURT: But that did what?

15 MR. CHALKER: That decided, ultimately, to terminate  
16 Mr. Joe Reno's employment.

17 THE COURT: And where -- I'm sorry, can you point me  
18 to that in his deposition?

19 MR. CHALKER: Yes, it's in Howarth's deposition,  
20 which is the first page of Exhibit 25, I believe, and it's at  
21 lines 16 and 17 of Howarth's deposition.

22 THE COURT: I'm sorry. You have to bear with me a  
23 little bit. What page of his deposition?

24 MR. CHALKER: Page 34.

25 THE COURT: Okay.

1                   MR. CHALKER: Okay. So I just wanted to rebut any  
2 suggestion that the decision to -- to -- to terminate Joe  
3 Reno's employment was made by some Delphi employee in a vacuum  
4 without knowledge of his whistle blower complaint and/or  
5 without knowledge of the incomplete status of the dumpster  
6 investigation because Mr. Howarth has said to the contrary.

7                   I'd like to, just take a quick look at Exhibit 4. I  
8 think I better get my listing here and make sure I have my  
9 numbers correct. Exhibit 4, Your Honor, is that amended  
10 complaint and it does set forth the causes of action both in  
11 the federal court action which is stayed at this time in Ohio,  
12 and in this court. I won't bore the Court with reviewing them  
13 but I would note, as the Court has, that there is a public  
14 policy whistle blower a  
15 count contained in these actions which does not require  
16 specificity or reference to any particular law being violated.  
17 I'd also note that there is an ERISA claim, and that's count  
18 two and that's pages 6 and 7 of joint Exhibit 4. And I wanted  
19 to point that out to the Court because that's a stand-alone  
20 theory of liability as to Delphi. What happened there, Your  
21 Honor, was that Delphi refused, on multiple occasions, after  
22 Mr. Reno's termination of employment on March 17th of 2004, to  
23 pay out his vested pension fund. And in fact the payout did  
24 not take place until approximately two years later and only  
25 upon my filing an amended complaint in the Federal District

1 Court amending the complaint to add this ERISA violation did  
2 Delphi then payout the funds which they should have paid out  
3 before that time.

4 THE COURT: So and -- I'm sorry, the -- given that  
5 they were paid out, the claim is for --

6 MR. CHALKER: Well, it's for -- well, not to pay for  
7 damages but there was a diminution in value.

8 THE COURT: That -- that's what the claim is for it's  
9 the diminution of value between the date that they should have  
10 been paid out and the date that they were paid out?

11 MR. CHALKER: Correct.

12 THE COURT: Okay.

13 MR. CHALKER: It should not have taken two years and  
14 the filing of an amended complaint to force a payout of a  
15 vested pension.

16 THE COURT: Okay.

17 MR. CHALKER: The other causes of action are as  
18 written. COBRA violation, ERISA, whistle blower, public  
19 policy, wage payment, defamation and the Fair Credit Reporting  
20 Act violations, which I've previously mentioned.

21 We've talked about Exhibit 5 and Exhibit 6, Exhibit 7  
22 is the whistle blower letter. Exhibit 8 and 9 are pieces of  
23 evidence, written statements, signed statements which exculpate  
24 Mr. Reno from any wrongdoing -- from misdoing. With respect to  
25 the dumpster investigation, I'd note, for the record, Your

1 Honor, that Investigator Brown never obtained a single signed  
2 statement, sworn or otherwise, to the contrary. He never -- in  
3 fact, he based his entire opinion upon the third oral statement  
4 of Troy Calton as his interim report makes clear. And  
5 thereafter -- thereafter could not ever get Calton to put that  
6 in writing. When I asked him about that, and it's in  
7 deposition testimony here in his exhibit, Investigator Brown,  
8 amazingly said that that meant no red flag. As far as he was  
9 concerned the oral statement of Calton was -- was perfectly  
10 fine even though he had given prior inconsistent oral  
11 statements and even though he refused to put any incriminating  
12 statements in writing.

13 THE COURT: Didn't Calton say that -- and this was  
14 after he'd talked with Onyx's lawyer--

15 MR. CHALKER: Yes.

16 THE COURT: -- that he --

17 MR. CHALKER: Well, he talked with the Onyx owners.

18 THE COURT: -- Onyx owners.

19 MR. CHALKER: In -- in a group interview.

20 THE COURT: No, no, no. Didn't -- didn't Calton say  
21 that he'd provide a written statement if he -- if Onyx and he  
22 got a release?

23 MR. CHALKER: that's what Investigator Brown states  
24 in his double hearsay statement. But we don't really know, as  
25 we sit here today and stand here today, we don't really know

1 what Calton said during any of those oral interviews because  
2 Investigator Brown has no record, no statement, nothing to  
3 show. All we have is what Investigator Brown says Calton said,  
4 which is, of course, double hearsay.

5 THE COURT: Did he -- did Calton, in his deposition?

6 MR. CHALKER: In his deposition he did not  
7 incriminate Mr. Reno. He said, and it's in the joint exhibits,  
8 he said that there was no conspiracy. That Joe Reno never  
9 intimated, asked or otherwise requested or suggested that --  
10 that the dumpster that Mr. Reno had ordered for his personal  
11 use be paid for by Delphi.

12 THE COURT: Did -- he said that he assumed that would  
13 be the case though, right?

14 MR. CHALKER: I'm sorry?

15 THE COURT: He said he assumed that would be the case  
16 though, right?

17 MR. CHALKER: He did say he assumed that was the case  
18 but he had no basis for that assumption. And furthermore, I'd  
19 refer you to the Exhibit 10, which is the OSHA statement of  
20 Joanne Rowe.

21 THE COURT: Uh-huh.

22 MR. CHALKER: Now, the significance of this OSHA  
23 statement is -- is tri-fold, really. Number one, it  
24 demonstrates that there was really no reason to even have a  
25 dumpster investigation. Because everything that the dumpster

1 investigation was supposed to determine was already known to  
2 Delphi. Joanne Rowe has it in this statement. She said,  
3 before the dumpster investigation ever began, I told Gooding or  
4 I told Delphi where I learned that this -- this box came from  
5 Joe Reno's property. And furthermore, importantly, it's in  
6 here that Troy Calton took steps, he took active measures to  
7 prevent this box -- the paperwork for this box being mixed in  
8 and somehow being paid for by Delphi. So there was no  
9 conspiracy.

10 So, there was no conspiracy. There was no mystery.  
11 There were no unknown facts that required a dumpster  
12 investigation other than the personal animus of Mr. Gooding.

13 THE COURT: But -- but wasn't -- but didn't the  
14 dumpster investigation, and I appreciate the term makes it  
15 sound like the Caine Mutiny and the Ice Cream Incident. But  
16 doesn't the dumpster investigation pre-date --

17 MR. CHALKER: It does.

18 THE COURT: -- the -- the tank?

19 MR. CHALKER: It does predate it.

20 THE COURT: So, I mean, if -- if Gooding didn't  
21 like -- if the reason that that investigation started was  
22 because Gooding didn't like Mr. Reno, it wasn't because of the  
23 tank, it was for some other reason.

24 MR. CHALKER: No, it was personal animus.

25 THE COURT: But -- but -- then how can this be

1 retaliation for the tank?

2 MR. CHALKER: It's not. It's the -- the dumpster  
3 investigation is not retaliation in any way, shape or form for  
4 the protected activity. It is and was a pretext for  
5 termination of Joe Reno's employment because that investigation  
6 was incomplete. It was--

7 THE COURT: But why would they go through all of  
8 that? I mean, they hire an investigator --

9 MR. CHALKER: Right.

10 THE COURT: -- they interview employees. It  
11 obviously creates a big, you know, mishigas or fasceria or  
12 whatever ethnic term you want to use at -- at, you know, at the  
13 Troy plant. Why would they bother to do that just to create a  
14 pretext for something that's going to happen in the future that  
15 they don't know about? I mean it --

16 MR. CHALKER: At the time that -- that Gooding  
17 initiated the dumpster investigation, the problems that were  
18 about to happen with the leaking hazardous chrome tank were  
19 unknown to all parties, I freely admit that. This dumpster  
20 investigation was initiated for no good purpose, other than the  
21 personal animus by Supervisor Gooding. And I cite this Joanne  
22 Rowe statement as proof of that because there was nothing to  
23 investigate. All the fact, all the material facts with respect  
24 to the dumpster investigation were already known to -- to  
25 Delphi and it's -- that's evidenced by this statement.

1                   THE COURT: Well, I'm going to bring in another  
2 allusion then. Unfortunately, sometimes stupid investigations  
3 lead to legitimate conclusions, as poor Mr. Libby just learned.  
4 I mean, Delphi's argument is that during the investigation,  
5 unfortunately for Mr. Reno, he, you know -- he lied and he did  
6 other things that weren't appropriate.

7                   MR. CHALKER: Well, I suggest that if you scratch the  
8 surface and get below the "he lied," what did he lie about?  
9 There's no evidence that he lied. There is absolutely no  
10 evidence. The only thing that -- that --

11                  THE COURT: Well, he said -- he -- Calton said under  
12 oath that they went together to drop the dumpster off at the  
13 plant. And Reno said just the opposite. And he also said  
14 that --

15                  MR. CHALKER: That's true, Your Honor. But it is a  
16 non-significant fact. And also, I think Calton was confused by  
17 that. It makes no sense why Joe Reno would ride in a dumpster  
18 truck from his residence, miles away, and then be dropped off  
19 at -- at the plant. How was he supposed to get home? It just  
20 makes no sense.

21                  THE COURT: Well, maybe with his friend Troy?

22                  MR. CHALKER: Calton was confused on that point, Your  
23 Honor.

24                  THE COURT: Okay.

25                  MR. CHALKER: But the -- the point of Exhibit 10 is

1 that there was no substance to the dumpster investigation and  
2 it would have died a natural death but for the intervening,  
3 superseding protected activity that commenced on February 20th  
4 and then finalized on March 17th.

5 We've talked about Exhibit 11 being evidence that --  
6 of this protected activity. And there is a plethora of  
7 evidence to support the arguments that were ongoing between  
8 Gooding and Reno with respect to how to comply with the  
9 environmental laws arising out of repairing the tank. Not only  
10 do we have Joe Reno's own declaration, we have his whistle  
11 blower letter, Exhibit 7. We have the testimony of Terry  
12 Brown, a contractor, which is joint Exhibit 22, wherein he  
13 describes the arguments that he overheard or knew of between  
14 Gooding and Reno on or about February 20th. And then we have  
15 the Troy Calton deposition, page 88, lines 8 and 10 where he  
16 also describes his knowledge of this ongoing dispute Reno and  
17 Delphi with respect to how to address the ongoing environmental  
18 hazard.

19 THE COURT: He said the source of that was -- was  
20 Reno, right?

21 MR. CHALKER: Are we talking about Calton, Your  
22 Honor?

23 THE COURT: Yeah.

24 MR. CHALKER: That's --

25 THE COURT: I mean, I don't know how much to accord

1 to that anyway, but --

2 MR. CHALKER: That's 24.

3 THE COURT: -- since it was clearly from someone other  
4 than -- he -- I don't think he says he was present when they  
5 were having their argument.

6 MR. CHALKER: I don't recall, Your Honor. I'll look  
7 it up real quick. "Question: He and they -- he wanted to fix  
8 it and they didn't. Answer: Joe Reno wanted to do -- fix the  
9 whole tank and Mark Gooding wanted to fix just part of it.  
10 Question: When did that come -- when did you come to know  
11 this? During that process of doing that job while Joe was still  
12 there? Uh-huh. Yes. Yes, I'm sorry."

13 THE COURT: Yeah. As I -- I remembered it wasn't  
14 that clear how he knew. Anyway, I don't -- it's not -- let me  
15 ask you a different question though. If -- given -- given  
16 today's world and given the fact that Mr. Reno, in his letter  
17 to -- is it Walee or Wala -- or I don't know you pronounce --

18 MR. CHALKER: It's Walle.

19 THE COURT: Walle. Very clearly linked his -- his  
20 problems with the suspension to the -- his report about the  
21 tank. Doesn't -- doesn't that very fact make any employer  
22 think twice about firing someone who you would normally fire.  
23 I mean, isn't -- isn't Delphi's action --

24 MR. CHALKER: Arrogant?

25 THE COURT: Well, no, no. I was going to say, well,

1 I guess that's the only response is that it's arrogant. But it  
2 would seem to me that --

3 MR. CHALKER: It would seem that -- that a careful  
4 employer would have thought twice about going forward with the  
5 termination under these circumstances, and would have allowed  
6 the dumpster investigation to go to its conclusion if that  
7 indeed was not a pretext. That did not happen here. We had a  
8 triumvirate decision made in Troy, Michigan on March 17th to  
9 terminate Joe Reno's employment. And even if it was a mixed  
10 motive situation, Your Honor -- even if it was a mixed motive  
11 where some of the motive is attributable to the dumpster and  
12 some of it is attributable to the hate and discontent due to  
13 his whistle blower letter, the Price Waterhouse line of cases  
14 490 US 228, the 1989 Supreme Court case would indicate that if  
15 it's a situation of mixed motives, Mr. Reno still prevails.

16 THE COURT: Well, but -- we're -- let me get to  
17 the -- doesn't the -- doesn't the Sixth Circuit say "more  
18 likely" to have been motivated by an illegal motive in Manzer,  
19 in interpreting this -- the Ohio law?

20 MR. CHALKER: The Sixth Circuit -- I don't have Sixth  
21 Circuit case in front of me. But I will tell you that the  
22 second circuit --

23 THE COURT: But they -- Second Circuit wasn't  
24 interpreting the Ohio common law rule or the Ohio statute,  
25 right?

1                   MR. CHALKER: No, sir. But we're talking about a  
2 mixed motive case by the U.S. Supreme Court here. And I think  
3 that's pretty good precedent for the proposition that if there  
4 were, and I'm not saying there were, but argue in though if  
5 there were mixed motives going on here in that office in Troy,  
6 Michigan on March 17th that Mr. Reno still prevails, assuming  
7 one of the mixed motives had to do with his whistle blower  
8 letter and the hate -- the discontent that that obviously  
9 created.

10                  THE COURT: Can I go -- go back to something on  
11 motive, though? And maybe I -- I just misunderstand this  
12 point. As far as what actually happened at the plant, they  
13 actually brought in third parties, didn't they? I mean, it  
14 wasn't like they were protecting Gooding. They brought in the  
15 third parties to check the tank and by the -- by the third week  
16 of March had done the repairs on it.

17                  MR. CHALKER: Well --

18                  THE COURT: I mean, usually the whistle blowers'  
19 claims are -- well, I guess they come in two -- two stripes.  
20 But -- but the -- the clearest stripe is where the people in  
21 the company, generally, are hiding something. And that doesn't  
22 appear to be the case here.

23                  MR. CHALKER: Well, they were hiding something, Your  
24 Honor. They were hiding the fact that they were unwilling to  
25 test the tank more than three feet from the base.

1                   THE COURT: But they -- but they brought in these  
2 people who rejected the tank the next day.

3                   MR. CHALKER: Anyway. But -- but who knows what  
4 problems were in that tank above the three foot level.  
5 Understand what Mr. Reno was arguing for was to go inside that  
6 tank, grind it down to bare metal. Do a testing on the entire  
7 tank. And not just that tank. He wanted to do it on the  
8 companion tank which was of the same age and condition so that  
9 there would be no -- to prevent any leaks of cancer-causing  
10 agents into the environment. So, Delphi did not -- through  
11 Gooding, did not want to go through that expense so they  
12 decided, we're going to take an ostrich in the sand approach  
13 here. We're only going to test this tank so we don't find any  
14 problems beyond three feet from the -- from the ground level.  
15 You know, that's egregious, Your Honor. And it was something  
16 that -- that was causing tremendous argument -- arguments to  
17 not -- not limit the testing and the repairs of the tanks.  
18 That was the position that was well known and argued by Joe  
19 Reno on or about February 20th when he was suspended from his  
20 employment.

21                   THE COURT: Okay.

22                   MR. CHALKER: Your Honor, I'm going to give you, now,  
23 the Joe Reno case in a nutshell. I'm getting tired of talking  
24 here, all right? Between February 20th of 2004 and March 17th  
25 of 2004 absolutely nothing occurred in the dumpster

1 investigation with the temporal proximity to explain Joe Reno's  
2 discharge on March 17th of 2004. What did happen during this  
3 period -- this crucial period of time, February 20th to March  
4 17th of 2004, was Joe Reno's March 2, 2004 whistle blower  
5 letter. That was followed in close temporal proximity by  
6 Delphi's discharge of Joe Reno after more than twenty-two years  
7 of employment. Because whistle blower cases are decided on  
8 temporal proximity, I'm asking, respectfully, that this Court  
9 render a judgment in favor or my client Joseph Reno.

10 Thank you, Your Honor.

11 THE COURT: Let me just look at one thing. I -- I'm  
12 sorry. I did have one other question for you. And that's not  
13 to take anything away from your summation. That was -- that  
14 was fine. But I was just going back to the work that Delphi  
15 did. There is this -- in addition to Exhibit 13, which was the  
16 American Services Testing, which was on the 20th, there's a  
17 report here from Hubble Rock and Clark, which is Exhibit 19.  
18 It's dated March 26th but I think that it goes through the  
19 whole chronology here. And their -- their inspector, Mr. Cote  
20 visited this site on March 6th and it seems -- and my -- well,  
21 were there any limitations placed on HRC's analysis here? I  
22 mean, were they told just to look at the, you know, the --

23 MR. CHALKER: Three feet up.

24 THE COURT: -- three feet up or were they authorized  
25 and directed to do whatever was -- you know, recommend to do

1 whatever was appropriate?

2 MR. CHALKER: That's not something that was put into  
3 evidence in the Federal District Court case, so I'm not  
4 really -- really not aware of what HRC was, what their mission  
5 was. I will say that this HRC report is -- it -- it -- it  
6 indicates that there was a minor problem going on. And that's  
7 simply not true. It was a major problem which resulted in  
8 fifteen -- at least there was at least one fifteen inch crack  
9 and that it was -- it was not as insignificant an environmental  
10 emergency as the Hubble Rock reports leads us to believe. But  
11 as far as what they were directed to do, that was not -- never  
12 placed into evidence.

13 THE COURT: Okay. All right. Thank you.

14 MR. HOGAN: Again, this is Al Hogan from Skadden Arps  
15 for the debtors. Judge, this is obviously not a pleasant case,  
16 in the sense that a long-time Delphi employee was terminated.  
17 But on the merits, in terms of what the plaintiff has to prove  
18 here, it actually is a -- a fairly straightforward case. Joe  
19 Reno's employment with Delphi was not terminated because he was  
20 a whistle blower. If -- to the extent there is any connection  
21 between those two it's -- it's exactly reversed. In the sense  
22 that Mr. Reno was attempting to become a whistle blower because  
23 he knew his employment with Delphi was about to be terminated.  
24 But, the important point is the former. His employment wasn't  
25 terminated because he was a whistle blower or because he

1 claimed to disagree with how Delphi was fixing the leaking  
2 waste water tank in its Dayton, Ohio facility. Mr. Reno was  
3 terminated because Beth Patrick, a director in the Human  
4 Resources Department of Troy, Ohio, reasonably determined that  
5 Mr. Reno had engaged in misconduct that violated Delphi's  
6 employment policies. The evidence that has -- has been  
7 admitted overwhelmingly shows that that was Ms. Patrick's  
8 decision and that was the basis for that -- for that decision.

9 Mr. Chalker talked in terms of who participated --

10 THE COURT: Could it -- before you go on, there -- I  
11 mean, it is -- the evidence does -- I think it's -- maybe --  
12 maybe you don't dispute this, she was also aware of the whistle  
13 blower letter.

14 MR. HOGAN: She certainly was. At the time -- two  
15 points in time, Judge. Ms. Patrick made the decision to  
16 suspend Mr. Reno on February 20th with no awareness of the  
17 leaking tank issue.

18 THE COURT: Right. But -- but I think what -- what  
19 the claimant is saying is that normally that suspension would  
20 have been, sort of, a slap on the wrist and he would again go  
21 back to work. Or, at least they'd complete the investigation  
22 and then do something. And instead the -- what she learned  
23 subsequently -- led to the termination.

24 MR. HOGAN: Right. And -- and the chronology is, is  
25 that Ms. Patrick explains in her declaration that she made that

1 suspension decision without any knowledge. She was informed of  
2 the whistle blower letter prior to the termination decision and  
3 really acted in spite of that as opposed to because of that  
4 on -- on March 17th. Ms. Patrick also does state very clearly,  
5 and so does Mr. Brown in his amended declaration, that there  
6 was communication of some additional investigation to the folks  
7 at corporate. Ms. Patrick says she looked at some updated  
8 results of Mr. Brown's investigation and so, it's also not in  
9 dispute, Judge. We don't contend that Mr. Brown believes his  
10 investigation was completed, that's true. He -- he still did  
11 want to do some interviews. But the question is, from Ms.  
12 Patrick's perspective, did she have enough evidence based on  
13 what the investigation had uncovered to -- to make her  
14 termination decision and -- and she did. And her declaration  
15 is -- is unambiguous. No one at Delphi ever suggested or  
16 hinted to her that Mr. Reno was being terminated or should be  
17 terminated because of anything having to do with -- with the  
18 environmental issue. Her decision was based solely on a clear  
19 violation of -- of Delphi policies.

20 There's -- there's really no doubt, based on the  
21 evidence that her -- her conclusion with respect to what the  
22 underlying dumpster investigation had revealed was -- was a  
23 reasonable one. And the evidence shows, pretty clearly, that  
24 Mr. Reno was engaged in misconduct.

25 There's the debate about whether or not Mr. Calton's

1 first story or second story was -- was accurate. But Judge, if  
2 we look at just the undisputed facts in the 2003 and 2004 time  
3 frame, it's clear that Ms. Patrick could -- could have stepped  
4 back and looked at all of this and concluded Mr. Reno had  
5 violated the policies. First, it's undisputed that Delphi had  
6 a clearly stated policy against conflict of interest and  
7 really, sort of a zero tolerance policy, in terms of  
8 solicitation of favors from vendors. That's spelled out in Tab  
9 17 of the exhibit book. That is Delphi's Foundation of  
10 Excellence Policy. The first page of this exhibit, by the way,  
11 is Mr. Reno's acknowledgment that he received this policy in  
12 2001. And if you -- if you flip through the policy there is  
13 clear disclosure of -- of Delphi's stance with respect to  
14 conflicts of interest. And these policies are made on common  
15 sense as well. They talk about how, in the Foundations of  
16 Excellence, that a conflict can arise or even the appearance of  
17 benefits from people with whom Delphi does business. There's  
18 also -- and that's on page 6, 7 and 8 of the policy. There --  
19 there is also, on page 13 of the policy, there's something that  
20 talks about soliciting gifts or favors. And really that  
21 policy, it is a zero tolerance policy. It states that the size  
22 of the gift or the favor is immaterial. Delphi employees  
23 simply cannot solicit favors from people that do business with  
24 Delphi. And all conduct in this regard that creates even the  
25 appearance of impropriety must be avoided. So, those are

1 Delphi's policies. They have those policies because Delphi's a  
2 huge corporation and their business relationships are  
3 innumerable. And obviously, with suppliers and both with  
4 vendors this is Delphi's policy and it was clearly articulated  
5 and was in place in 2003. Mr. Reno knew about it.

6 Undisputed fact, sometime in 2003 Mr. Reno decided  
7 that he needed a dumpster delivered to his personal residence  
8 so he could get rid of some yard debris. Undisputed that he  
9 approached Troy Calton who was an Onyx -- the main Onyx contact  
10 for Delphi's Kettering facility, and who really reported to Mr.  
11 Reno in the context of the Delphi business relationship.

12 It is disputed about what was said in that meeting.  
13 Mr. Reno claimed that he said he would pay for it in full. Mr.  
14 Calton, you know, now says that that's really not what the  
15 arrangement was. But Judge, what is undisputed is that in this  
16 transaction Mr. Reno handed a hundred dollars in cash to Mr.  
17 Calton. He got no receipt at the time. There was no purchase  
18 order. There was no work order. There was no documentation  
19 of -- of any kind. It's also undisputed that Mr. Reno did not  
20 seek out any superior to clear this in advance or even advise  
21 them that he was going to engage in this transaction with a  
22 Delphi vendor. Instead what Mr. Reno claims is that he  
23 deliberately conducted this all cash-no document transaction in  
24 front of witnesses who also just happen to be his subordinate  
25 employees at Delphi. And so, even if you accept that version

1 of events, that's misconduct -- that's clearly misconduct under  
2 Delphi's policy. But the incredibility of Mr. Reno's version  
3 only gets greater when these events start to come to light. As  
4 the record shows, in late January Delphi learned about the  
5 dumpster on its property that was -- was -- was suspicious.  
6 Very quickly Mr. Reno learned that Delphi was investigating  
7 this. And although he claims that this was a big  
8 misunderstanding, rather than raise his hand and go to any  
9 supervisor, anyone in HI to try and clear this up, he  
10 immediately begins creating back-dated receipts for the payment  
11 of this dumpster and soliciting three employees to provide  
12 witness statements. Notably, one of those employees said I'm  
13 not going to do it. And two of the subordinate employees did  
14 provide witness statements in terms of a conversation that  
15 supposedly happened four months later.

16 Once Mr. Reno collected this information he did  
17 nothing with it. Knowing that his dumpster was on Delphi  
18 property, knowing that Delphi was looking into it, he waited  
19 for approximately two weeks until Mr. Brown reached out to him  
20 to conduct the investigation. Now, Judge, it could be, I  
21 suppose in some world, that all of these undisputed facts are  
22 the result of just a very -- a string of very bad decisions by  
23 Mr. Reno, innocently taken. But that's not at likely.

24 Beth Patrick looking at this set of circumstances in  
25 2004 concluded that it wasn't likely. Concluded that there was

1 a clear violation of this policy and that Mr. Reno had, worse  
2 yet, attempted to obfuscate the facts once Delphi tried to  
3 understand what had happened. And of course, Judge, if you add  
4 to that what Mr. Calton then said, again when he was presented  
5 with the -- the reality that his way to avoid consequences was  
6 to tell the truth, Mr. Calton then further says that the  
7 dumpster had been placed back on Delphi property by both  
8 himself and Mr. Reno. It had been sitting there for months and  
9 that he intended -- he assumed that Delphi would be billed for  
10 that. If you -- if you give that any weight, and I think  
11 certainly everyone was entitled to at the time, the underlying  
12 misconduct case is -- is clear. It's unfortunate but it  
13 warranted a termination and that's what -- what ultimately  
14 happened.

15 Mr. Reno suggests that the causal effect here is that  
16 he was terminated not because of this dumpster investigation,  
17 but because of the concerns he raised over the waste water  
18 tank. And again, Ms. Patrick is very clear on that. In her  
19 declaration, paragraph 11, she said that nobody at Delphi,  
20 either subordinate to, equal to or superior to her hinted at or  
21 even suggested that Mr. Reno be terminated because of his  
22 complaint about the water tank.

23 Now, in the face of this direct testimony what --  
24 what evidence there is is, there is no direct evidence of any  
25 causal link that Delphi sought to terminate Mr. Reno because of

1 his complaints with respect to this environmental matter. In  
2 this case that's -- it's noteworthy in any case but it's  
3 noteworthy in this -- in the context of this claims hearing  
4 because we've -- we've expanded the record. There was  
5 substantial discovery that happened in this case in the Federal  
6 District Court. Depositions, documents, all sorts of things  
7 took place and there is no direct evidence where anyone  
8 provided any -- any evidence that said we want to fire Joe Reno  
9 because he's causing us problems on the environmental side. It  
10 just doesn't exist.

11 So, the only -- the only evidence, and Mr. Chalker  
12 talked about it extensively, is the temporal overlap. The fact  
13 that on February 20th, the same day that Ms. Patrick  
14 independently decided to suspend him, there was an incident  
15 going on with the -- with the waste water tank. The overlap is  
16 on the calendar. But if you look at the timeline, I think Your  
17 Honor referred to it just a little bit ago, the timeline  
18 actually shows why the -- the pretext story doesn't hold up.  
19 The dumpster matter or the dumpster investigation began long  
20 before anyone raised any concerns about this waste water tank.  
21 Almost six weeks before -- I'm sorry, almost four weeks before  
22 the leak was discovered and four weeks before Mr. Reno was --  
23 was suspended.

24 Mike Brown, who was conducting Delphi's investigation  
25 said that he didn't learn about the leak until after Mr. Reno

1 had been terminated. And so, once again, there's -- there's  
2 all kinds of evidence. The evidence overwhelmingly points to  
3 the fact that the dumpster investigation was proceeding. It  
4 had been launched. The findings were coming out the way they  
5 were coming out and the -- the environmental issue arose as a  
6 coincidence during this same time frame.

7 Judge, you pointed to some documents. I don't think  
8 the Court needs to wade into the field of metallurgical  
9 engineering to understand what happened here. But there's --  
10 there's no doubt that the substance that was at issue was  
11 something that had to be treated carefully. Mr. Chalker points  
12 to the -- the report from the ATS Company. And that company  
13 did come out, right around February 20th, investigated the  
14 tank. But the -- the other reports that Your Honor referred  
15 to, at Tab 19 and then there's another one at Tab 21, that's  
16 from the Montgomery Department of Sanitary Engineering. What  
17 happened there was that after these events occurred and after  
18 Mr. Reno voiced his complaints in his whistle blower letter,  
19 Delphi had these folks out. They redrained the tank and both  
20 the independent consulting agency and the Department of  
21 Sanitary Engineering concluded that Delphi was proceeding  
22 reasonably.

23 Putting aside the debate about how to best fix a  
24 tank, I think the more interesting matter is the time frame in  
25 which Mr. Reno actually disclosed the tank issue. He says that

1 he first learned about this on February 13, 2004. There's at  
2 least some evidence that this problem may have been known  
3 before that. Terry Brown who is a Crown Solutions employee,  
4 that's at Tab 23 of his deposition. He testified that Crown  
5 actually knew something was going on with this tank for months  
6 prior. And that although he couldn't remember it, it was their  
7 typical practice to report this to Mr. Reno. Mr. Reno was  
8 their only point of contact. But putting that aside, it's  
9 undisputed that on February 13th the tank incident becomes --  
10 becomes a bigger incident and Mr. Reno takes the actions that  
11 he takes. But for the next five days he doesn't report the  
12 leak to anyone at Delphi. It's not until February 18th that  
13 Mr. Reno reports the tank incident to anyone at Delphi.

14 In between that time period, Mr. Reno was interviewed  
15 by Mr. Brown. And in between that period of time Mr. Brown was  
16 also scheduling the second interview with -- with Troy Calton.  
17 So Judge, I think it's a reasonable inference that the dispute  
18 that was happening in this late February time period was -- was  
19 influenced, from Mr. Reno's perspective, by what was -- what  
20 was going on with respect to the dumpster investigation. But  
21 again, the important point is that as of February 20th the  
22 suspension decision was made by Ms. Patrick without any  
23 knowledge of what was going on with respect to the tank.

24 Mr. Brown actually did do some other investigations  
25 after he came back from his vacation which was -- happened on

1 February 20th. He talked to Mr. Ruble, who was an employee who  
2 said Mr. Reno asked me for a statement and I wouldn't provide  
3 it. Mr. Ruble also talked about how he had done some personal  
4 work with Mr. Reno in the past. He talked to another  
5 contractor who said that he didn't know about it but by the way  
6 I also did some work with Mr. Reno in the past. I did some  
7 favors for him. So, by the time the termination decision  
8 happens, that update is provided and Ms. Patrick determines  
9 that the investigation appears to be conclusive about the  
10 misconduct. We're not learning anything and so she proceeded.

11 After -- after Mr. Reno was terminated he filed the  
12 complaint with OSHA. OSHA conducted an investigation and OSHA  
13 determined that Mr. Reno wasn't terminated because he was a  
14 whistle blower but instead, because he engaged in misconduct  
15 regarding the dumpster incident. That OSHA finding is  
16 contained at Tab 20 of the evidence binder.

17 Judge, what OSHA saw and what Ms. Patrick saw at the  
18 time is evident from the evidence. And that is that Mr. Reno  
19 engaged in misconduct and that was the reason for his  
20 termination. Judge, I won't repeat the legal arguments we've  
21 made concerning the various whistle blower causes of action but  
22 based on this evidence, Mr. Reno cannot maintain a claim under  
23 either the Ohio statute or the Ohio public policy with respect  
24 to his discharge.

25 Quick discussion on the Fair Credit Reporting Act

1 claim, that claim is frankly a throw away. The damages are  
2 limited to a thousand dollars. But that claim focuses on  
3 consumer reports from a consumer reporting agency. And  
4 there's -- if you read the statute I would submit that it just  
5 doesn't apply to a case like this where you have, basically, a  
6 full-time contractor who does investigations and is not doing  
7 anything that looks like a consumer report. He's investigating  
8 specific incidents. I don't think that statute applies.

9 THE COURT: Well, I didn't -- is there anything in  
10 the record as to whether Brown's firm does reporting on  
11 consumers on a regular basis?

12 MR. HOGAN: There is -- Judge, I'm not aware of  
13 anything that's in the record. I know that Mr. Brown does not.

14 THE COURT: But that -- but that -- but that's not in  
15 the record, right? I didn't see him say anything about that in  
16 the record.

17 MR. HOGAN: No, no.

18 THE COURT: Okay.

19 MR. HOGAN: I didn't see anything in the record about  
20 what his firm may -- actually,

21 THE COURT: You can -- you can -- I'm going to give  
22 you some time to respond so if there's something that --

23 MR. CHALKER: Thank you, Your Honor. I plan to  
24 respond.

25 THE COURT: -- Mr. Hogan missed, you can tell me.

60

1 MR. CHALKER: Thank you.

2 THE COURT: Okay.

3 MR. HOGAN: I do know, and again this is in the  
4 record, I do know Securitas is a very large firm. It's a  
5 global security firm. So I don't know. They may do all sorts  
6 of things.

7 THE COURT: Okay.

8 MR. HOGAN: But I know that Mr. Brown does not. So  
9 we maintain that that -- that statute simply doesn't apply.  
10 Judge, the defamation claim goes away because I don't think  
11 this was -- I don't think there's any defamatory statements  
12 made here. And Delphi didn't -- certainly didn't report this  
13 to any perspective employers. The defamation claim really  
14 falls with the whistle blower claim.

15 The last thing is the ERISA claim. Mr. Reno, in his  
16 deposition said he had been paid for his vested pension  
17 benefits. The only evidence that we have right now is Mr.  
18 Reno's declaration where he alleges an ERISA damage of 6,000  
19 dollars. I don't know where that calculation comes from. I  
20 don't know what it is. I don't know how to support it so I  
21 don't know how to respond to it. But I know there was a delay  
22 from the time that Mr. Reno was terminated to when he was paid.  
23 That's -- so that's the only thing that's in the record right  
24 now, Judge. I would suggest that -- that he -- the claimant  
25 hasn't met his burden to establish what the basis for that

1 6,000 dollar claim is.

2 THE COURT: Well, but the damages aren't for today  
3 anyway, right?

4 MR. HOGAN: He hasn't, but even if there's a delay,  
5 I'm not sure -- on this one, Judge, we maybe overlooked a  
6 problem. And that is, it sounds like his claim, and the  
7 damages that flow from it, are one and the same. If there's a  
8 time value of money aspect to this claim, we either paid him  
9 the right amount or we didn't. And I simply -- I simply think  
10 that -- that's not articulated in his -- anywhere in Mr. Reno's  
11 claim.

12 THE COURT: Okay.

13 MR. HOGAN: At a minimum, I think we should -- we  
14 should consider looking at that one as a one-off basis.

15 THE COURT: Well, it seems to me if there's a damages  
16 claim, it will be based upon whether he was harmed based upon  
17 the payment that was made to him. And if the payment that was  
18 made to him included an accrual calculation for the interest  
19 that he should have gotten, then he wouldn't be harmed. But if  
20 it didn't, then he was harmed.

21 MR. HOGAN: I agree completely, Judge. And I guess  
22 what I'd say is, I don't think it's -- I don't think we can  
23 make a liability finding on that today. I know we talked about  
24 the concept --

25 THE COURT: I don't -- I don't think so either.

1 MR. HOGAN: At a subsequent damages hearing --

2 THE COURT: Okay.

3 MR. HOGAN: I think we can address that as part of  
4 dealing with that -- that potential hearing.

5 THE COURT: Okay.

6 MR. HOGAN: Judge, if you -- if you don't have any  
7 other questions, I think that concludes my remarks.

8 THE COURT: The Foundations of Excellence Policy --

9 MR. HOGAN: Yes, sir.

10 THE COURT: It -- it -- as I read it, I mean it's  
11 a -- it's a very good upstanding statement of corporate  
12 principles, and I understand the reasons for them. It doesn't  
13 say that there's a zero -- does it -- I don't think it says  
14 there's zero tolerance here, does it?

15 MR. HOGAN: With respect to the solicitation of gifts  
16 or favors there's --

17 THE COURT: Oh, there's a -- there's a magnitude  
18 element too.

19 MR. HOGAN: Yes.

20 THE COURT: But it doesn't say you will be fired if  
21 you --

22 MR. HOGAN: No, it doesn't -- it does not list -- I  
23 don't believe it lists consequences in here of violating any of  
24 these policies. I believe that's right.

25 THE COURT: Okay.

1                   MR. HOGAN: Those decisions are handled by the human  
2 resources professionals.

3                   THE COURT: All right. Okay. Do you have any brief  
4 response?

5                   MR. CHALKER: Very brief.

6                   THE COURT: All right.

7                   MR. CHALKER: Thank you, Judge, Brad Chalker once  
8 again for claimant Joseph Reno. Contrary to what opposing  
9 counsel just said, the dispositive question here is not whether  
10 there was enough evidence in the subjective mind of Beth  
11 Patrick on March 17th of 2004. If that were true, then Delphi  
12 lied to OSHA as to the triggering reason for its termination  
13 on -- of Mr. Reno's employment because, as we know from beating  
14 that to death, they told OSHA it was the completion of  
15 Investigator Brown's dumpster investigation that was the  
16 triggering event. Of course we further know --

17                  THE COURT: I guess I -- maybe I'm missing something  
18 there but if -- if there is enough -- if he gave her enough to  
19 make a decision, and I conclude that that decision was not  
20 pretextual --

21                  MR. CHALKER: right.

22                  THE COURT: Does it really matter that it wasn't  
23 complete?

24                  MR. CHALKER: It does matter, Your Honor. It matters  
25 a lot as to what was the precipitating cause. Because temporal

1 proximity is everything in these whistle blower cases. Was  
2 it -- the temporal proximity, why did they pick March 17th to  
3 terminate his employment? Was it really because Beth Patrick  
4 in her subjective mind felt she had sufficient evidence, based  
5 on the incompetent investigation of Investigator Brown? I  
6 submit not. And we have evidence to the contrary because they  
7 told OSHA. You know, that's -- that is a misrepresentation  
8 during the course of a government investigation. It got Martha  
9 Stewart in trouble. It got Scooter Libby in trouble and it got  
10 Delphi in trouble in this -- in this situation. You don't make  
11 those kinds of misrepresentations on a key important point.  
12 They were -- they had to come up with a reason why they picked  
13 March 17th because nothing happened in the dumpster  
14 investigation. Again, contrary to what opposing counsel just  
15 said, there may have been some local activity but what Brown  
16 said in his sworn statement is, I didn't communicate any of  
17 that activity to corporate headquarters where they were making  
18 the ultimate decision. I didn't communicate any activity. I  
19 made no contacts, whatsoever, to corporate folks after February  
20 20th and before March 17TH.

21 THE COURT: But he did -- he did communicate some  
22 more information, right? I mean, Mr. Hogan alluded to some  
23 other information about third parties doing work for Mr. Reno

24 MR. CHALKER: He said -- he said to the contrary,  
25 during the course of his -- in the written OSHA statement that

1 he made and in his deposition testimony he said, I communicated  
2 nothing to the decision makers.

3 THE COURT: Well, not to the decision makers but  
4 they -- but to somebody. And --

5 MR. CHALKER: Well, he may have done that on a local  
6 level but --

7 THE COURT: -- and they -- and they could have  
8 communicated that to the decision makers.

9 MR. CHALKER: Well, he certainly didn't communicate  
10 that he completed his investigation. And that is not splitting  
11 hairs. That is the temporal proximity reason given in the  
12 course of an official government investigation as to why.

13 THE COURT: The why -- I guess -- I understand -- I  
14 understand the point about the -- the temporal overlap with  
15 February 20th. And the debtors have their response to that.  
16 But why is -- why is March 17th so important? I don't  
17 understand how that date is -- it's important because he was  
18 fired then, but I don't understand how that coincides with  
19 anything else.

20 MR. CHALKER: Well, it coincides because there was no  
21 material event occurring in the dumpster investigation between  
22 February 20th and March 17th. On the other hand there was a  
23 material event in the whistle blower case in that -- that the  
24 whistle blower letter that he wrote on March 2nd was received  
25 on March 3rd based upon the response date of Walle's letter of

1 March 4th.

2 THE COURT: Okay. All right.

3 MR. CHALKER: So during that period of time the only  
4 material event that happened was the whistle blower letter and  
5 it obviously ticked people off.

6 Further, in response --

7 THE COURT: Except he -- he was already suspended.

8 MR. CHALKER: With pay, with benefits pending the  
9 completion of an investigation that was never completed.

10 THE COURT: Okay.

11 MR. CHALKER: There was some suggestion here as to  
12 the billing for the -- for the dumpster. I want to clear that  
13 up. These dumpsters -- there's a -- there's a two-step  
14 process. You put down a deposit, Mr. Reno did that. It's not  
15 been contested. There's no evidence to the contrary. He paid  
16 a hundred dollars for -- to have the dumpster delivered to his  
17 home. Then there's a tipping fee, because you don't know what  
18 the ultimate cost of it is until they weigh it and tip it and  
19 look at -- see what's inside of it. So, when it was tipped Mr.  
20 Reno did pay that fee and the affidavit of Atchison, which is  
21 Exhibit 14, evidences that he told -- in front of Atchison he  
22 told Calton I will pay the tipping fee once you tip it. The  
23 tipping fee was paid as is evidenced by -- by Mr. Reno. So  
24 Delphi was never out any money and Mr. -- and there's evidence  
25 in the record that -- that Mr. Reno intended for Delphi never

1 to be out any money as a result of his use of this dumpster.

2 And that's an important point.

3 During the course of the dumpster investigation,  
4 Investigator Brown never came up with one -- not one written,  
5 signed statement, not one affidavit, not one unsworn statement  
6 to support his ridiculous conclusions that Mr. Reno committed  
7 any misconduct during the course of this dumpster debacle.

8 And it's not temporal overlap. I pointed out  
9 temporal proximity between the event of the whistle blower  
10 letter and the adverse employment action. It's not overlap,  
11 it's a proximity.

12 And third, I guess there was an admission here that  
13 there was a Fair Credit Reporting Act violation, but it's only  
14 worth a thousand dollars so --

15 THE COURT: No, no. I think he -- he said that -- I  
16 think he said that it may not be worth the time spent arguing  
17 on it but it's -- it's -- they're not liable either.

18 MR. CHALKER: It -- it's worth it from my standpoint  
19 because it demonstrates the illegal nature of the investigation  
20 by a third party. And it doesn't have to be a third party that  
21 is engaged in consumer reporting. It's a third party  
22 investigator, period. And that's what took place here. So  
23 Delphi was bound, did violate the Fair Credit Reporting Act.

24 That's all I have, thank you.

25 THE COURT: Well, a detective agency doesn't count,

1 necessarily, under the -- as a -- a covered party under the  
2 Fair Credit Reporting Act. They have to be a certain type  
3 of --

4 MR. CHALKER: No, no, Your Honor. I believe that's  
5 incorrect. If -- if an employer contacts a third party to  
6 conduct an investigation, whether it's credit history, whether  
7 it's an internal misconduct investigation, there are  
8 consequences -- legal consequences that flow from that. Now,  
9 if it's an internal -- internal investigation of misconduct, as  
10 this was, there are lesser requirements than if it is a  
11 consumer credit report, which then results. But it's --  
12 there's still consequences under the Fair Credit Reporting Act.  
13 As long as you go outside your company, as Delphi did and hire  
14 a third party to do the investigation.

15 THE COURT: Well --

16 MR. CHALKER: I cite the Fair Credit Reporting Act in  
17 my trial brief, page 4.

18 THE COURT: Yeah.

19 MR. CHALKER: Section 603(x) provides special  
20 procedures for investigations of suspected misconduct.

21 THE COURT: But I'm looking at the definition of  
22 consumer reporting agency. There's a 2002 case by District  
23 Judge Jones from the Southern District. She finds someone who  
24 was commissioned to do a report was not a consumer reporting  
25 agency.

1                   MR. CHALKER: But there are additional burdens on a  
2 consumer reporting agency. When a third party entity is  
3 retained to do a misconduct investigation, there are lesser  
4 requirements, those being, essentially, you've got to give a  
5 summary of your report to the subject of your investigation.

6                   That's all I have, Your Honor.

7                   THE COURT: I'm -- I'm sorry, you've got to show that  
8 to me. I -- I didn't get that out of your brief. Where is  
9 that?

10                  MR. CHALKER: It's page 4. Fair Credit Reporting  
11 Act, special procedures for employee investigations. Section  
12 6.03(x). They're not treated as consumer reports, I grant you  
13 that.

14                  THE COURT: Well, what -- what -- what -- 15 USC,  
15 what section?

16                  MR. CHALKER: 1681. I don't have the actual language  
17 in front of me but --

18                  THE COURT: Isn't this an exception that you're  
19 referring to that says that this isn't covered by the Act.

20                  MR. CHALKER: It's not covered by the Act so long  
21 as -- so long as -- it says, these investigations are not  
22 treated as consumer reports so long as the employer or its  
23 agent complies with the procedures set forth in section  
24 603(x)."

25                  THE COURT: Right. But that doesn't change the

1 underlying definition of a consumer report or -- or a consumer  
2 reporting agency, right? It doesn't -- there's not a separate  
3 definition of that. There's only one definition of that term,  
4 right, in the FCRA?

5 MR. CHALKER: I -- I have to look at it more closely,  
6 Your Honor.

7 THE COURT: Okay. All right. But this -- this  
8 section, you're -- this section you're referring to is in 1681,  
9 right?

10 MR. CHALKER: I believe so. Yes, sir.

11 THE COURT: And it's the one that exempts certain  
12 types of -- and you're saying they're not within the exemption.  
13 I understand you -- I understand that point that they're not --  
14 you're saying they're not within the exemption.

15 MR. CHALKER: Right.

16 THE COURT: But I don't think that section states  
17 that the definition of a consumer report is anything other than  
18 how its defined elsewhere in the code, right?

19 MR. CHALKER: Right. There -- there was a  
20 controversy which was resolved, I believe, by -- by this  
21 exception if you will. And it's my position, and I have no  
22 reason to believe otherwise, that Investigator Brown, by virtue  
23 of being an employee of a third party investigation company,  
24 Securitas, Inc., which is admitted to be a huge private  
25 detective agency if you will, by virtue of calling him in to do

1 an employee, he still had limited duties under the Fair Credit  
2 Reporting Act those being -- to provide a summary of his report  
3 to the object of the adverse employee action.

4 THE COURT: Okay. All right.

5 MR. HOGAN: Judge, other than if you have any  
6 questions on the 1681, I don't have anything further.

7 THE COURT: Well, I mean, I think -- are you at least  
8 going to tell me what I thought I just said which is that --

9 MR. HOGAN: Real quickly, Judge 1681 is --

10 THE COURT: -- that this provision doesn't change the  
11 definition of consumer reporting.

12 MR. HOGAN: It doesn't change, first of all, the  
13 provision exception was effective March 31, 2004, after this --  
14 very close but after the report. It's an exception and it  
15 says, but for this subsection, the communication would be --  
16 would be a consumer report. It uses the same term and then it  
17 goes through the exceptions.

18 THE COURT: And that consumer report is someone -- is  
19 a report issued by a consumer reporting --

20 MR. HOGAN: Consumer reporting agency.

21 THE COURT: -- agency.

22 MR. HOGAN: Okay? Thank you.

23 THE COURT: All right. Okay. I'm going to take a  
24 break till 12:30 and then come back.

25 (Recess from 12:17 till 12:30 PM)

1                   THE COURT: Please be seated. Okay. We're back on  
2 the record in Delphi Corporation and in particular I'm going to  
3 give a bench ruling on the debtors' objection to the proof of  
4 claim filed by Mr. Joseph Reno. As I generally do with fairly  
5 lengthy bench decisions, I'll give it orally because I think  
6 it's important for the parties to know the result right away,  
7 but I will review the transcript. And I'll review it not only  
8 for accuracy but also reserve the right to edit it if what came  
9 out of my mouth, remarkably, didn't make sense and to correct  
10 it, and that will be my final ruling. But I will not change  
11 the gist of my ruling.

12                   The claim by Mr. Reno sets forth a number of theories  
13 of recovery, but I should note first that today's hearing, by  
14 agreement of the parties, was limited to the merits of those  
15 theories, with the parties reserving to a subsequent hearing,  
16 if necessary, a determination of damages in connection with any  
17 claims that I find to be meritorious.

18                   The theories all stem from the same common facts,  
19 except the last one, which is a claim under ERISA for damages  
20 resulting from delayed payment of pension benefits. The  
21 claimant also makes a claim under COBRA, and obviously that  
22 claim itself does not derive from the facts that I'm going to  
23 go through in a moment, but the debtors' defense does.  
24 Essentially, as both parties have stated, those facts pertain  
25 to Mr. Reno's termination as an employee of Delphi in March of

1 2004. Mr. Reno contends that that termination was a wrongful  
2 discharge in retaliation for his view expressed to his  
3 supervisor, and ultimately to an in-house lawyer at Delphi,  
4 that Delphi needed to take certain steps to correct a condition  
5 in a waste water container tank, and that might exist in  
6 another waste water container, and that, consequently, he has a  
7 wrongful discharge claim and/or a claim under Ohio's  
8 whistleblower statute because he was terminated in light of  
9 Delphi's receipt of the letter informing Delphi of the waste  
10 water container issue.

11 He also contends that Delphi did not comply with the  
12 Fair Credit Reporting Act in the conduct of, and the provision  
13 of information in connection with, Delphi's investigation of  
14 him. This is not only a claim but is also offered as evidence  
15 to show the real motivation rather than the pretextual basis,  
16 for Delphi's termination of Mr. Reno.

17 Delphi, on the other hand, contends that Mr. Reno was  
18 fired not because of his environmental warning or the point of  
19 view that he raised with his supervisor, and ultimately with  
20 in-house legal staff, but rather because of information that  
21 Delphi learned pertaining to Mr. Reno's conduct on the job and  
22 in connection with an investigation of that conduct.  
23 Consequently, Delphi argues that his termination was not  
24 wrongful, but proper, and certainly was not retaliatory. It  
25 contends that because Mr. Reno was properly terminated for such

1 reasons, it did not have a responsibility, under COBRA, to him  
2 and that it also is not liable for the remaining cause of  
3 action, which I have not yet described, which is a defamation  
4 claim.

5 Finally, Delphi contends that the investigation that  
6 it commissioned and the use of that investigation were not  
7 covered within the ambit of the Fair Credit Reporting Act and,  
8 consequently, that there was nothing improper or actionable in  
9 connection with the investigation, and, further, that no  
10 inference can be drawn from any alleged impropriety under the  
11 Fair Credit Reporting Act as to Delphi's motivation in  
12 terminating Mr. Reno's employment.

13 As with most claims of this nature, the parties have  
14 very different views as to the underlying facts. They have  
15 presented those facts in a written record before the Court in a  
16 joint exhibit binder that includes witness declarations, as  
17 well as the prior testimony of witnesses, and letters and e-  
18 mails, which I've reviewed.

19 In light of the differences in the underlying  
20 testimony and the nature of the claims here, it's important to  
21 delineate the burden of proof, which I think the parties  
22 generally agree upon. As the claimant, Mr. Reno, has the  
23 ultimate burden of proof. However his claim, in large measure,  
24 comes down to an assertion that the reason proffered for his  
25 termination by Delphi was and is merely a pretext. Under those

1       circumstances the courts have developed a burden-shifting  
2       regime which provides that, under the proper circumstances, by  
3       showing a prima facie case of retaliation the claimant may  
4       shift the burden to the defendant to articulate a legitimate  
5       non-retaliatory reason for its employment decision. That is,  
6       the employer meets that burden by showing an alternative reason  
7       than the discriminatory one stated by the claimant, which the  
8       claimant then may show was only a pretext.

9               In my view -- although, and I'll get to this in a  
10      moment, at oral argument claimant may have been setting forth a  
11      somewhat different burden-shifting argument -- once the  
12      employer has come forward with a non-discriminatory reason for  
13      firing the claimant, the claimant again has the ultimate burden  
14      of proof. The area of potential doubt is whether he meets that  
15      burden by showing that it is more likely the case that the  
16      claimant was fired for the discriminatory reason, or  
17      alternatively, that he need show only that the non-  
18      discriminatory reason articulated was not the only basis for  
19      the termination, but, rather, there was a mixed motive,  
20      including an improper one. In the "pretext" cases, I believe  
21      that the burden is on the claimant to show that it is more  
22      likely that he or she was terminated for a discriminatory or an  
23      improper reason or a retaliatory reason. See *Manzer v. Diamond*  
24      *Shamrock Chemicals*, 29 F.3d 1078 (6th Cir. 1994). In a prior  
25      Title VII context, the latter view, however, was adopted by a

1 plurality opinion of the Supreme Court in *Price Waterhouse v.*  
2 *Hopkins*, 490 U.S. 228 (1989), although, again, that was in a  
3 Title VII context, not focusing on the pretextual argument that  
4 the claimant is making here.

5 In any event, I find that Delphi's articulated reason  
6 was not a mere pretext and that Mr. Reno has not proven an  
7 improper or retaliatory reason for Delphi's firing him.

8 Let me proceed through the factual record and address  
9 first the wrongful discharge claims, since I believe that  
10 consideration of the other claims, with the exception of the  
11 ERISA claim, all flow from that analysis.

12 First, it should be noted that Mr. Reno asserts  
13 claims under both Ohio's whistleblower statute and then,  
14 second, or alternatively, under Ohio common law that his  
15 termination violated Ohio public policy as arising from his  
16 having raised a legitimate workplace concern regulated by  
17 federal and state environmental laws dealing with hazardous  
18 wastes.

19 The Ohio whistleblower statute should be addressed  
20 first, because, at least based on my reading of it, as well as  
21 the cases interpreting it, it contains procedural requirements  
22 that obviously do not exist under the Ohio common law wrongful  
23 termination cases, and I find that Mr. Reno did not comply with  
24 those procedural requirements, and, under the case law  
25 interpreting Ohio Rev. Code Ann. § 4113.52(A)(1)(a), he would,

1 therefore, not have a claim. The statute requires that an  
2 employee (a) orally notify his or her supervisor, or other  
3 responsible officer of the employer, of the alleged violation,  
4 and (b) subsequently file with that person a written report  
5 that provides sufficient detail to identify and describe the  
6 violation. And then it provides for a mechanism, if those  
7 requirements have been satisfied, for the employer to correct  
8 the violation or make a reasonable and good faith effort to  
9 correct it within twenty-four hours after the oral notification  
10 or the receipt of the written report, whichever is earlier.  
11 And then it provides an opportunity for the employee to seek  
12 appropriate redress.

13 The debtors contend that Mr. Reno did not comply with  
14 this provision in two respects. One I don't accept. Although  
15 it's somewhat of a close call, I believe he did set forth in  
16 sufficient detail the environmental concerns or hazardous  
17 substance concerns that he claims, legitimately, existed with  
18 respect to the container tanks. However, procedurally he did  
19 not provide oral notification of those conditions to the person  
20 to whom he then sent the written report. That is, he informed  
21 Mr. Gooding, his supervisor, orally of the conditions and  
22 subsequently mailed his letter to Mr. Walle, the in-house  
23 counsel at Delphi.

24 Given the timing constraints and specific language of  
25 this statute, that means that he has not complied with it and

1 he doesn't have a cause of action under it. See Haney v.  
2 Chrysler Corp., 699 N.E.2d 121, 122 (Ohio Ct. App. 1997).

3 There are other potential defenses to this cause of  
4 action, but I believe that they are best dealt with in the  
5 context of the other wrongful discharge claim raised by Mr.  
6 Reno, which is that he was suspended or terminated contrary to  
7 Ohio public policy. That public policy claim doctrine was  
8 adopted by the Ohio Supreme Court in Greeley v. Miami Valley  
9 Maintenance Contractors, Inc., 551 N.E.2d 981 (Ohio 1989).  
10 It's an exception to Ohio's general at-will employment  
11 standard, which permits an employer to terminate an employee at  
12 will for any cause at any time whatsoever.

13 In order to have a claim for discharge in violation  
14 of public policy under Ohio law, the claimant must show (1) the  
15 existence of a clear public policy (that is, the "clarity"  
16 element); (2) dismissal under the circumstances would  
17 jeopardize that policy (the "jeopardy" element); (3) dismissal  
18 related to a public policy (the "causation" element); and (4)  
19 lack of an overriding business justification for the employer's  
20 action. The debtors do not dispute the "clarity" or "jeopardy"  
21 elements laid out in the Ohio cases, including Painter v.  
22 Graley, 639 N.E.2d 51 (Ohio 1994) and Urban vs. Osborne Mfg.,  
23 Inc., 847 N.E.2d 1272 (Ohio Ct. App. 2006). They do, however,  
24 dispute causation, arguing strenuously that Mr. Reno was not  
25 dismissed because of his championing the public policy of the

1 State of Ohio and the United States to have an environmentally  
2 clean and safe workplace, but, rather, for a wholly separate  
3 reason.

4 They also contend, relatedly, that the overriding  
5 business justification for his termination was, again, that his  
6 personal conduct was in violation of Delphi's policies, as  
7 opposed to his disagreement with Mr. Gooding over the proper  
8 maintenance and protection of the container tanks and the  
9 surrounding environment or his making that concern known to Mr.  
10 Walle in his letter.

11 I've been through the factual record, and, as is  
12 often the case with claims of this kind, there is no smoking  
13 gun and the claimant relies upon the Court's drawing inferences  
14 from circumstantial evidence. On its face, that circumstantial  
15 evidence, to my mind, does set forth a *prima facie* case, in  
16 that on the very day that Mr. Reno had his dispute with Mr.  
17 Gooding about the container tanks he was put on administrative  
18 suspension, albeit with full pay and benefits.

19 Moreover, he was terminated just short of a month  
20 thereafter, after he had notified Mr. Walle on March 2, 2004 of  
21 his concern about the container tank's condition as well as his  
22 concern about being put on suspension. Between February 20th,  
23 when he was suspended, and the date of his termination, that  
24 letter on its face is one of only two significant factual  
25 developments. The other is some additional investigatory work

1 done by the third party investigator, Mr. Brown, that the  
2 debtors had hired to investigate a situation that I will talk  
3 about in a moment. But those facts alone, in my mind, raise  
4 enough of a concern to shift the burden to Delphi.

5 I find, however, based on my review of the factual  
6 record, including not only the declarations of Ms. Patrick and  
7 Mr. Brown but also the depositions and prior testimony and  
8 witness statements, that Delphi has met its burden to show that  
9 it was not motivated by the hazardous waste or environmental  
10 issues that Mr. Reno raised with his supervisor and then  
11 disclosed to Mr. Walle, or by Mr. Reno's having raised those  
12 issues. And, having shifted the burden back to Mr. Reno, I do  
13 not believe that Mr. Reno has overcome the evidence that  
14 supports my conclusion that Delphi terminated him for separate  
15 reasons that were legitimate and unrelated to retaliation over  
16 Mr. Reno's having aired his views as to the container tanks.

17 Specifically, it became known to Delphi that a  
18 dumpster owned by one of its contractors had been placed on the  
19 Dayton property, or the Dayton site, containing garbage and  
20 debris that was not Delphi's. In and of itself that was a  
21 fairly innocuous event; however, it was of enough concern,  
22 apparently, to cause Mr. Reno's boss, Mr. Gooding, to arrange  
23 for a third party investigator, Mr. Brown, to determine the  
24 circumstances under which the dumpster came to the site. The  
25 reason for that concern appears to be that it was very quickly

1 assumed, and assumed correctly, that the debris in the dumpster  
2 originated with Mr. Reno. Delphi has a clear policy against  
3 conflicts of interest and, separately and distinctly,  
4 soliciting gifts or favors from suppliers or vendors or  
5 customers. And there was an appearance that that may have  
6 occurred here. All of this occurred well before the date that  
7 Mr. Reno says he first learned of the waste water treatment  
8 container issue, which he says was February 13, 2004.

9 The investigation started two weeks before then. And  
10 the investigator interviewed Mr. Reno on February 16th, as well  
11 as other parties involved. As a result of that investigation  
12 process Mr. Brown concluded that Mr. Reno had obtained a favor  
13 from Troy Calton, an employee of a company called Onyx that  
14 works directly for, as a contractor, Mr. Reno, to remove  
15 material from his yard and/or house. Brown also learned that  
16 this arrangement may well have been a secret one, and that it  
17 was, at least, not cleared in advance with Mr. Reno's  
18 superiors, and, perhaps as importantly, that in the process of  
19 the investigation Mr. Reno was not forthcoming as to the facts  
20 of the relationship and had sought out from his subordinates  
21 witness statements in connection with the relationship, which  
22 he held in reserve. All of this led Mr. Brown and also  
23 Delphi's personnel officers to conclude that Mr. Reno had  
24 violated both Delphi's no-favors policy and the conflict of  
25 interest policy, as well as potentially put undue pressure on

1 subordinates and perhaps asked them to remember facts that they  
2 could not remember or that were not, in fact, the truth.

3 The record, I should be clear, is not one where I can  
4 ultimately decide whether Mr. Brown's conclusions were right or  
5 wrong. But, beyond that, the claimant contends that they were  
6 so clearly incorrect that Delphi could not credibly be said to  
7 have relied on them as a basis for his termination, which is a  
8 proper inquiry for me to make.

9 I'll note first in considering the conclusions that  
10 Mr. Brown made that I do credit his conclusions with regard to  
11 the underlying arrangements between Calton and Mr. Reno. Mr.  
12 Calton changed his story in a second interview with Mr. Brown,  
13 in a way that I believe indicated that the second version is  
14 the correct version. It is, moreover, one that Mr. Calton's  
15 subsequent deposition in key respects corroborates, namely that  
16 the dumpster was filled and taken under an arrangement with Mr.  
17 Reno, with Mr. Reno's knowledge and, in fact, at least as  
18 Calton stated in his deposition, Calton's implied assumption  
19 that ultimately the cost would be run through Delphi's  
20 accounting system. To my mind, having reviewed Delphi's  
21 Foundation of Excellence Policy, at Exhibit 17, whether  
22 ultimately Mr. Reno felt he was going to pay, in full, for this  
23 dumpster arrangement is less important than the fact that he  
24 engaged in it at all with Mr. Calton without disclosing it to  
25 his supervisors.

1                   I also believe that Mr. Reno's not being forthcoming  
2 about the facts of this relationship was fairly well  
3 established through Mr. Brown's investigation. And that, in  
4 turn, lays some doubt on the witness statements that Mr. Reno  
5 got out of his subordinates, particularly in light of the facts  
6 that one of them did not provide a witness statement although  
7 Mr. Reno asked him to do so -- that individual being the one  
8 who was apparently no longer working for Delphi -- as well as  
9 Mr. Calton's testimony that neither of the individuals who did  
10 provide statements was present when he had the discussion with  
11 Mr. Reno about the dumpster.

12                   Ms. Patrick states in her affidavit, and I believe  
13 that the record corroborates this, that Mr. Reno was put on  
14 suspension before she, or anyone making that decision,  
15 understood his contention about the container tanks, and that  
16 it was a coincidence that Gooding gave him this news on the  
17 very day that they had their argument about the tanks.

18                   That moves the analysis, therefore, to the subsequent  
19 period. And I think that this is where Mr. Reno and his  
20 counsel properly turned their attention. Their argument is  
21 that, in essence, the work that Brown did and that led Delphi  
22 to suspend Mr. Reno was not sufficient to lead to his  
23 termination and could not be viewed to be sufficient to lead to  
24 his termination, but, rather, that it was the subsequent  
25 development of Reno's sending his letter to Mr. Walle, and his

1 insistence on a different approach to the container tank  
2 problem than Mr. Gooding wanted to take, that led to the  
3 termination.

4 There is no direct evidence of this in the record.

5 The claimant relies, therefore, on two things. First, he  
6 contends that the "dumpster incident," as the parties have  
7 referred to it, is simply too insignificant to lead to his  
8 termination. (And I should note that he has spent his career  
9 at Delphi).

10 Second, he contends that Mr. Brown's investigation,  
11 by Mr. Brown's own admission, was not complete at the time that  
12 Mr. Reno was terminated in March of 2004. Why not wait, Mr.  
13 Reno contends, until the investigation was complete -- for the  
14 record to be done --before making that decision? And the answer  
15 to that question, he says, is that it was simply a facade or a  
16 pretense -- or a pretext -- for the decision.

17 I've carefully considered those two points and I'll  
18 deal with them in order. It seems to me that it is regrettable  
19 that an individual would be fired over something as foolish and  
20 petty as this dumpster incident. However, Mr. Reno is a person  
21 charged with important duties that involve integrity,  
22 credibility and adherence to proper procedures. And I  
23 understand why Delphi could legitimately conclude that not only  
24 the relationship with the contractor but also the way that it  
25 appears Mr. Reno reacted to the investigation in terms of

1 arguably not telling the truth and arguably inducing  
2 subordinates to take positions on his behalf, arguably  
3 improperly, all support important and legitimate concerns as to  
4 his credibility, reliability and adherence Delphi's policies.

5 I have the impression, which I believe is  
6 corroborated to some extent by some updating of the initial  
7 investigation by Mr. Brown, that Delphi was concerned that this  
8 was not an isolated matter but that Mr. Reno had involved other  
9 people, both employees and contractors, in doing favors for  
10 him: for example, the statement by Mr. Ruble that he helped  
11 with an aquarium business owned by Mr. Reno's wife, even though  
12 Mr. Ruble testified that he did that work for Mr. Reno and his  
13 wife after hours.

14 So, it does not appear to me that the dumpster  
15 incident is, in fact, comparable to Captain Queeg's ice cream  
16 incident in the Caine Mutiny but, rather, it had substance to  
17 it, particularly given Mr. Reno's position of responsibility.

18 As far as the issue of what I should take away from  
19 Mr. Brown's acknowledgement that his investigation was  
20 incomplete, I have also considered that point, and I believe  
21 that in the absence of anything in the record to show how much  
22 more Mr. Brown felt he needed to make it complete, and in what  
23 sense he felt it was incomplete, I turn to the e-mail from him  
24 to Delphi on the day that Mr. Reno was suspended, in which  
25 Brown said that "it should be clear to everyone that Joe has

1 violated several rules" -- Joe meaning Mr. Reno. Brown said  
2 that in the same paragraph in which he acknowledged that he  
3 would like to do more work on the investigation. I don't  
4 believe therefore that, based on this record, the fact that Mr.  
5 Brown believed the investigation was incomplete is something  
6 that, in and of itself, shows that Delphi was using his work as  
7 a pretext, given what had already been disclosed.

8 Mr. Reno contends that I should look askance on  
9 Brown's investigation also because it was incompetent and  
10 illegal. And I've considered that argument as well. As far as  
11 the incompetency point, I'll note that Brown had been an  
12 investigator for six years, and I do not see in his  
13 investigation or in the subsequent testimony or record any  
14 attempt to do anything other than a good job. He does not  
15 appear to me to have been negligent, or, alternatively,  
16 motivated to reach a certain result. And I do not believe that  
17 the law requires him to conduct an investigation beyond what he  
18 did.

19 The contention of illegality dovetails back to Mr.  
20 Reno's claim that the investigation and the debtors' failure to  
21 provide a copy of it to Mr. Reno violated the Fair Credit  
22 Reporting Act. There may be instances where the failure to  
23 comply with a law such as the Fair Credit Reporting Act may  
24 lead a court to draw an inference that something very serious  
25 was motivating a party to act contrary to law, an ulterior

1 purpose. For example, here it is argued, at least between the  
2 lines, why would the debtor violate the FCRA but for the fact  
3 that it wanted to cover up that it was engaging in the whole  
4 exercise as a facade to hide a retaliatory purpose? I,  
5 however, do not accept that argument here. I will determine  
6 shortly whether the FCRA was violated or not. But I think, at  
7 a minimum, it is clear that it was not clearly violated. That  
8 is, someone in Ms. Patrick's position or Mr. Gooding's  
9 position, or other people involved in this process, would not  
10 have known with any degree of clarity that what they were doing  
11 was in violation of the FCRA -- which undercuts the whole  
12 inferential argument about an improper motivation.

13 Mr. Reno's contention that the FCRA applies here is a  
14 plain meaning argument that has been criticized by a number of  
15 courts, particularly in respect of the version of the statute  
16 that would be applicable here, which is that in addition to  
17 applying to the provision of reports with regard to a  
18 consumer's creditworthiness, credit standing and credit  
19 capacity, the statute provides that it applies to such reports  
20 going to a consumer's character, general reputation, personal  
21 characteristics or mode of living with regard to employment  
22 purposes.

23 I agree with Johnson v. Federal Express Corp., 147  
24 F.Supp. 2d. 1268 (M.D. Ala. 2001), Hartman v. Lyle Park Dist.,  
25 158 F.Supp. 2d 869 (N.D. Ill. 2001) and Rugg v. Hanac, Inc.,

1 2002 U.S. Dist. LEXIS 18101 (S.D.N.Y. 2001), as to their  
2 skepticism that the FCRA applies to this type of investigatory  
3 report dealing with a consumer's particular workplace conduct  
4 (that is, in contrast to reports going to decisions to hire or  
5 to fire based on general non-workplace conduct, such as set  
6 forth in *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d  
7 1264 (9th Cir. 1990) and *Hodge v. Texaco, Inc.*, 975 F.2d 1093  
8 (5th Cir. 1992)).

9                   In addition, I believe that the record, as it is,  
10 does not enable me to find that Mr. Brown's company, Securitas,  
11 which is not described other than as simply being a large  
12 investigatory company, would be a "credit reporting agency,"  
13 which is necessary to fit his investigation within the FCRA's  
14 definition of an "investigative consumer report" which, in  
15 turn, triggers the applicability of the statute under 15 U.S.C.  
16 § 1681a(f). That term is defined as "any person which, for  
17 monetary fees, dues or on a cooperative non-profit basis,  
18 regularly engages in whole or in part in the practice of  
19 assembling or evaluating consumer credit information or other  
20 information on consumers for the purpose of furnishing consumer  
21 reports to third parties, and which uses any means or facility  
22 of interstate commerce for the purpose of preparing or  
23 furnishing consumer reports." See again *Rugg v. Hanac, Inc.*,  
24 2002 U.S. Dist. LEXIS 18101 (S.D.N.Y. 2002).

25                   So, not only on the merits, but also, as importantly

1 -- since, as was pointed out in oral argument, even if Mr. Reno  
2 were to prevail on the merits of the FCRA claim he would get a  
3 very small amount of money -- in connection with evaluating  
4 whether Delphi was engaging in a pretext when it said that it  
5 relied upon Mr. Brown's investigation, I conclude that the FCRA  
6 has no bearing.

7 Therefore, in considering the circumstantial evidence  
8 in the record before me, where Delphi has come forward with a  
9 non-retaliatory or a non-discriminatory reason for firing Mr.  
10 Reno that I find credible, I do not believe that Mr. Reno has  
11 carried his burden of proof to show that this was not the only  
12 reason for his termination, or that, to the contrary, it was  
13 more likely that he was terminated in retaliation for having  
14 taken his views on the container tank issue over Mr. Gooding's  
15 head. The proof offered by Mr. Reno is too slim and his  
16 assertions of a bad motive too strongly contradicted by the  
17 record.

18 I'll note further, although ultimately this is a  
19 lesser reason for my holding, that Delphi in response to Mr.  
20 Reno's letter, at least shortly after the letter was received,  
21 commissioned a third-party environmental consultant to look at  
22 the tanks. That was done on March 6th, and that consultant's  
23 report appears in the record at Exhibit 19. So there does  
24 appear to be a prompt response by Delphi, and certainly no  
25 attempt to keep Mr. Reno's complaint under wraps, but, to the

1 contrary, to open it up to a third party. And I think the  
2 report not only has to speak for itself, because there's been  
3 no further testimony about its bona fides, but I think it does  
4 speak for itself as a legitimate third party corroboration of  
5 the bona fides of Delphi's actions. Moreover, Delphi later  
6 that summer, in May, apparently involved the local authorities  
7 in looking at the tanks, who also were satisfied.

8 So while I acknowledge that the sunshine aspect of  
9 what Delphi did doesn't necessarily obviate Mr. Reno's claim,  
10 because, after all, one could still infer, if the  
11 circumstantial evidence was sufficient, that Delphi terminated  
12 him because Delphi was mad that he raised the environmental  
13 concerns in the first place, it does further support Delphi's  
14 contention that as far as that aspect of his performance was  
15 concerned, as opposed to his dealings with Mr. Calton and  
16 subordinates, they considered Mr. Reno's advice and took it  
17 seriously.

18 Based on those findings, the defamation claim, I  
19 believe, will not lie under Ohio law. To state a claim under  
20 Ohio law for defamation, the plaintiff must show that there was  
21 a false statement defamatory to the plaintiff, published to a  
22 third party by a defendant who was, at least, negligent, that  
23 was damaging to the plaintiff's reputation. A plaintiff must  
24 prove a defendant's negligence by clear and convincing  
25 evidence, but need only prove the other elements by a

1 preponderance of the evidence. In a defamation action,  
2 therefore, falsity is an essential element. Furthermore, in  
3 defending against a defamation action, it is sufficient for the  
4 defendant to show that the imputation is substantially true, or  
5 as it is often put, to justify the gist, the sting or the  
6 substantial truth of the defamation. See *Parry v. Mohawk*  
7 *Motors of Mich.*, 236 F.3d 299, 312 (6th Cir. 2001) (citations  
8 omitted). Here, the alleged defamation was the statement that  
9 Mr. Reno was being terminated because of the dumpster incident  
10 and his conduct in connection with the investigation thereof.  
11 And for the reasons I've stated, there was, under the Ohio law,  
12 no basis for a defamation claim based on that statement.

13 The COBRA claim is, for me, somewhat more difficult  
14 to decide, given the posture of this action. The statute  
15 provides, in 29 U.S.C. § 1163(2) that continuing coverage is  
16 not required to be provided to an employee after termination  
17 for "gross misconduct." That term is not defined. The courts  
18 have grappled with the definition in various ways. One, at  
19 least, has said that "gross misconduct" constitutes a deviation  
20 from the employer's business ethics policy for, among other  
21 reasons, failing to disclose a financial interest in a  
22 supplier, accepting favors and gifts from a vendor and claiming  
23 reimbursement from the company for non-official travel. See  
24 *Karby v. Standard Prods. Co.*, Civ. A. No. 3:90-2918-17, 1992 WL  
25 333931 (D.S.C. 1992). A case out of Texas has defined the term

1 to mean a substantial deviation from the high standards and  
2 obligations of a managerial employee that would indicate that  
3 such an employee cannot be entrusted with his management duties  
4 without danger to the employer. See *Avina v. Texas Pig Stands,*  
5 Inc., 1991 U.S. Dist. LEXIS 13957 (W.D. Tex. 1991).

6 As I said, I have not determined here, because I  
7 cannot on this record, whether Mr. Brown was right or not. I  
8 have determined that there was enough of a basis in his  
9 investigation for a proper termination of Mr. Reno. But I do  
10 not know from his investigation whether he had established  
11 "gross misconduct." And I don't believe the debtors have  
12 established it here, either, as a matter of fact, for purposes  
13 of this statute. They have, again, established that they had a  
14 valid basis for terminating Mr. Reno, based on the  
15 investigation. They did not have to conduct a trial. But I  
16 think that proving gross misconduct, as opposed to proving that  
17 they had enough basis to terminate him, requires more in the  
18 factual record. And so I believe that they have not met what I  
19 think is their burden here to show gross misconduct.  
20 Therefore, I believe that Mr. Reno's COBRA claim is  
21 established.

22 Finally, as to the ERISA claim, I think it was made  
23 clear at oral argument that this claim really devolves into a  
24 damages issue. I did not see any opposition on the merits as  
25 to, for example, an alleged defense that it was proper to delay

1 distribution of Mr. Reno's pension money. And so the issue as  
2 to whether that distribution included an element of interest  
3 and/or if it didn't, what the proper damages would be for Mr.  
4 Reno's not having received it from the date -- which has also  
5 not been established -- that the pension money should have been  
6 distributed and the date it was, which has been established,  
7 should await further trial if the parties choose to do so,  
8 although my hope is, given the amount claimed, that there can  
9 be a resolution of that matter.

10 All right. As I said, I'm going to go over the  
11 transcript, because obviously this has gone on, probably far  
12 too long for all of you, and I want to make sure it's accurate  
13 and properly reflects my thinking on the issues. But again,  
14 the conclusions won't change. So, Mr. Hogan, you should submit  
15 an order, consistent with my ruling, which disallows all of the  
16 claims except for the COBRA and ERISA claims, reserves the  
17 ERISA issue for further trial on damages calculation and allows  
18 the COBRA claim.

19 MR. HOGAN: We'll do so, Judge.

20 THE COURT: Okay. Thank you. Oh, you don't have to  
21 settle the order but I -- I -- circulate it -- I'm sure -- but  
22 I'll say it anyway, you'll provide it to counsel for Mr. Reno  
23 so that he can make sure that it says what I just said.

24 MR. HOGAN: We will, Judge.

25 THE COURT: Okay. Thank you.

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1 (Proceedings concluded at 1:58 PM)

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## I N D E X

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## RULINGS

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16 Denial of all claims 72 25  
17 except for COBRA and  
18 ERISA

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12 C E R T I F I C A T I O N

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I, Pnina Eilberg, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, except where, as indicated, the Court has modified its bench ruling.

19

20 \_\_\_\_\_ March 27, 2007

21

Signature of Transcriber

Date

22

23 Pnina Eilberg

24

typed or printed name

25

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